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In The

Supreme Court of the United States

October Term, 1994

JOHN L. HOLAHAN, JR., in his official capacity as Chair of the Minnesota Ethical Practices Board; HUBERT H. HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,

Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA; *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does a state campaign financing statute which does not restrict independent expenditures or dictate the content of messages financed through such expenditures violate the First Amendment because it provides a public benefit to a political candidate in response to independent expenditures in opposition to the candidate?

LIST OF PARTIES

The Petitioners in this action are John L. Holahan, Jr., Chair of the Minnesota Ethical Practices Board, and Hubert H. Humphrey III, Attorney General of the State of Minnesota.

The Respondents include: 1) the Appellants in Case No. 94-2387 below: Scott Day, Treasurer of IMPACE-MEA; IMPACE-MEA, a political fund; Steve Frazier, a Minnesota taxpayer and contributor to IMPACE-MEA; Richard Kimbler, a taxpayer and an Independent-Republican candidate for Secretary of State; and 2) the Appellants in Case Nos. 94-2388 and 94-2390: Minnesota Citizens Concerned for Life, Inc., a non-profit corporation organized under Minnesota law; Jacqueline A. Schwietz, Treasurer of the registered political fund Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates; Mitchell Hoyt Unruh, a candidate in 1994 for the Minnesota House of Representatives; and Lori Erickson, who ran for a seat in the Minnesota Senate in 1990 and intends to run again in 1996.

The parties to the proceedings in the court of appeals included all of the Respondents listed above and, in addition, Eileen Angell, Cross-Appellee in Case No. 94-2585. Because Eileen Angell did not file an appeal in the court of appeals with respect to the issue set forth in the Question Presented for Review in this petition, and because Petitioners do not seek review of the court of appeals' judgment in Case No. 94-2585 (concerning the constitutionality of the contribution limitations of Minn. Stat. § 10A.27, subd. 12 (Supp. 1993)), Petitioners believe

LIST OF PARTIES – Continued

that Eileen Angell has no interest in the outcome of this petition and have advised the Clerk of Court accordingly pursuant to Sup. Ct. R. 12.4.

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JOHN L. HOLAHAN, JR., in his official capacity as Chair of the Minnesota Ethical Practices Board; HUBERT H. HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on September 1, 1994.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), and is reproduced in the Appendix ("App.") at A1 to A24. The district

court's opinion is not reported and is reproduced in the Appendix at A25 to A66.

JURISDICTION

On September 1, 1994, the court of appeals entered its judgment in this case. A3. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1988).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

Minn. Stat. § 10A.01, subd. 10b (Supp. 1993):

> "Independent expenditure" means an expenditure expressly advocating the election or defeat of a clearly identified candidate, which expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate. An expenditure by a political party or political party unit, as defined in section 10A.275, subdivision 3, in a race where the

political party has a candidate on the ballot is not an independent expenditure.

Minn. Stat. § 10A.20, subd. 6b(a) (Supp. 1993):

> Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of $100, other than an expenditure by an association targeted to inform solely its own dues-paying members of the association's position on a candidate, the individual, political committee, or political fund shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy on the treasurer of the candidate's principal campaign committee. The affidavit must contain the information with respect to the expenditure that is required to be reported under subdivision 3, paragraph (g); except that if an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.

Minn. Stat. § 10A.25, subd. 13 (Supp. 1993):

> (a) The expenditure limits in this section are increased by the sum of independent expenditures made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents, other than expenditures by an association targeted to inform solely its own dues-paying members of the association's position on a candidate.
>
> (b) Within 48 hours after receipt of an expenditure report or notice required by section 10A.20, subd. 3, 6, or 6b, the board shall notify

each candidate in the race of the increase in the expenditure limit for the candidates against whom the independent expenditures have been made.

(c) Within three days after providing this notice, the board shall pay each candidate against whom the independent expenditures have been made, if the candidate is eligible to receive a public subsidy and has raised twice the minimum match required, an additional public subsidy equal to one-half the independent expenditures. The amount needed to pay the additional public subsidy under this subdivision is appropriated from the general fund to the board.

STATEMENT OF THE CASE

This case involves a First Amendment challenge to a Minnesota campaign financing statute relating to independent expenditures. As described further below, the statute at issue increases the spending limits of, and provides a public subsidy to, candidates against whom such independent expenditures are made. Also at issue in this case is the constitutionality of another state statutory provision dealing with the reporting of independent expenditures. Following is a summary of the background to this legislation and a description of the operation of these statutes.

I. BACKGROUND.

Responding to concerns about the public's confidence in the political process and about the potential for

corruption of the political process through undue influence by large financial contributors, the 1993 Minnesota Legislature adopted the Act of May 20, 1993, ch. 318, 1993 Minn. Laws 1882 ("Chapter 318"). Chapter 318 extensively amended Minnesota's laws relating to political campaigns and campaign financing, including Minn. Stat. ch. 10A, the Minnesota Ethics in Government Act.[1] The legislation was adopted after consideration of recommendations of a task force that was made up of a broad-based group of people including both Democrats and Republicans. App. at A100-01. The task force included legislators, representatives of the Ethical Practices Board, lobbyists, and representatives from the League of Women Voters, the Joint Religious Legislative Coalition, the Citizens League, Common Cause, and other groups. *Id.* at A106-07.

The overall goal of the task force was to formulate recommendations that would "enhance the public's confidence in the political process and in public officials" and to "encourage a broader public participation in the electoral process." *Id.* at A103 and A108. The task force members noted that perceptions of fairness and propriety had a direct link to voter confidence in the system and hoped by their proposals to remove barriers to candidacy by qualified challengers; to simplify the system of running for office; to bring about a more open, accountable, and responsive political process; and to increase the substantive quality of the elections. *Id.* at A103-104 and A108. They also hoped to decrease the influence of money while increasing the influence of merit in campaigns. *Id.* Among

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[1] Pursuant to Minn. Stat. § 10A.02 (1992), the Minnesota Ethical Practices Board (the "Board") is charged with administering, interpreting, and enforcing Chapter 10A.

the task force members' concerns were the decreases in direct participation in politics, caucus attendance, the number of people checking off for Minnesota's public campaign financing check-off system, and direct giving to campaigns. Instead, the task force found that more and more people were giving money to political committees to express their political views. App. at A110-11.

One of the important goals of Chapter 318 was to limit the potential for corruption or the appearance of corruption resulting from contributions to campaigns. For example, the legislation made dramatic reductions in the contribution limits applicable to candidates for statewide and legislative offices, in many cases reducing the limits by 90 percent.[2] The legislation also limits the total amount that candidates can accept from certain sources, specifically political committees, political funds, lobbyists, and certain individuals. Minn. Stat. § 10A.27, subd. 11 (Supp. 1993) (limits the aggregate contribution from those sources to twenty percent of the expenditure limits for the office sought by the candidate).

Chapter 318 also includes several incentives for candidates to participate in Minnesota's public subsidy/voluntary spending limit statutory scheme which is further described in the following section.[3] Among these incentives are the

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[2] This Court has upheld limits on contributions to candidates against a First Amendment challenge. *Buckley v. Valeo*, 424 U.S. 1, 28-29 (1976) (per curiam).

[3] This Court in *Buckley* held that mandatory limits on candidate campaign expenditures violated the First Amendment but distinguished expenditure limits that were part of the public financing scheme for presidential elections, stating: "Congress may engage in public financing of election campaigns and may

provisions relating to independent expenditures, Minn. Stat. §§ 10A.20, subd. 6b and 10A.25, subd. 13 (Supp. 1993), which are at issue in this petition. Respondents challenged the constitutionality of these independent expenditure provisions. The discussion below describes these independent expenditure provisions and the rulings of the lower courts in this case.

II. THE STATUTES AT ISSUE.

Because the independent expenditure provisions of Minn. Stat. §§ 10A.20, subd. 6b and 10A.25, subd. 13 (Supp. 1993) are closely related to the public subsidy/voluntary spending limit provisions of Chapter 10A, it is helpful to review Minnesota's public subsidy/voluntary spending limit statutory scheme in order to understand the independent expenditure provisions themselves. The following discussion describes: 1) the statutory scheme; and 2) the independent expenditure provisions and the role they play within that scheme.

A. The Public Subsidy/Voluntary Spending Limit Statutory Scheme.

Minnesota has established a system under which candidates may receive public money to conduct their

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condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." *Id.* 424 U.S. at 57 n.65. Thus, the Court approved using the incentive of public financing as an inducement to the acceptance of spending limits that could not be directly imposed. *See also Republican National Committee v. Federal Election Commission*, 445 U.S. 955 (1980), *aff'g mem.*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court).

campaigns in exchange for the candidates' agreement to be bound by campaign expenditure limits.[4] This statutory scheme benefits the public because it reduces the candidates' need to solicit contributions and reduces the potential for corruption or the appearance of corruption that can result from large contributions. Reducing the need to solicit funds promotes First Amendment values because it gives candidates more time to meet voters and publicly debate the issues. *See Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (per curiam); *Vote Choice v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993).

In order to receive a public subsidy, a candidate must sign and file with the Board a written agreement in which the candidate agrees to be bound by the campaign expenditure limits of Minn. Stat. § 10A.25, subd. 2 (Supp. 1993). The expenditure limits only apply to the candidate, however, if the candidate's major party opponent has also agreed to be bound by the expenditure limits. Minn. Stat. § 10A.25, subd. 10(b) (Supp. 1993). As an additional incentive to candidates to accept the expenditure limits, the 1993 Legislature added a provision which gives to the agreeing candidate (or candidates, in equal shares) a portion of the subsidy of the opponent who does not agree to the limits. Minn. Stat. § 10A.25, subd. 10(b) (Supp. 1993).

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[4] Minnesota first enacted legislation providing public subsidies for state election campaigns in 1974. Act of April 12, 1974, ch. 470, §§ 30-32, 1974 Minn. Laws 1172-74. That law also imposed expenditure limits. *Id.* at § 25, 1974 Minn. Laws 1169-70. In 1976, the legislature amended the law to couple public funding with an agreement to adhere to the spending limits. Act of April 13, 1976, ch. 307, § 34, 1976 Minn. Laws 1163-64.

Further, under the statutory scheme, no candidate is eligible to receive a public subsidy unless the candidate has accumulated enough contributions from eligible voters to meet the matching requirements of Minn. Stat. § 10A.323 (Supp. 1993).[5]

The amount of the public subsidy available is determined in accordance with a statutory formula for each office. Minn. Stat. § 10A.31, subd. 5 (1992). The amount for which each candidate is eligible depends on the county in which he or she is running and the number of votes received as a percentage of the total votes for the candidates of that party in the last general election. The

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[5] Additional eligibility requirements for receipt of a public subsidy are contained in Minn. Stat. § 10A.31 (1992 and Supp. 1993). A candidate who is unopposed in both the primary election and the general election is not eligible to receive a public subsidy. Minn. Stat. § 10A.31, subd. 12 (Supp. 1993). Candidates who win the primary election and whose names will appear on the ballot in the general election receive a public subsidy from the applicable "political party account" in the State Elections Campaign Fund, but candidates who lose the primary receive nothing from the fund. Minn. Stat. § 10A.31, subd. 6 (Supp. 1993). Thus, winning the primary is another eligibility requirement for receiving a public subsidy. The funds are distributed *after* the results of the primary election are determined. *Id.* Additional public subsidies are paid to candidates from the "general account." Funds in the general account are paid to candidates for statewide office who received at least five percent of the votes cast in the general election for that office, and to candidates for legislative office who received at least ten percent of the votes cast in the general election for the specific office for which they were candidates. Minn. Stat. § 10A.31, subd. 7 (Supp. 1993). Thus, in order to receive a public subsidy from the general account in the State Elections Campaign Fund, a candidate must receive enough votes in the general election.

total subsidy received by a candidate may not exceed 50 percent of the expenditure limit applicable to that candidate. Minn. Stat. § 10A.31, subd. 7 (Supp. 1993).

B. The Independent Expenditure Provisions.

Under the provisions added by Chapter 318, the making of an independent expenditure triggers certain requirements. An independent expenditure is defined as "an expenditure expressly advocating the election or defeat of a clearly identified candidate" but one made neither with consent or authorization of the candidate nor at the request or suggestion of the candidate. Minn. Stat. § 10A.01, subd. 10b (Supp. 1993). The first requirement triggered by the making of an independent expenditure is a reporting requirement, as follows:

> Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of $100, other than an expenditure by an association targeted to inform solely its own dues-paying members of the association's position on a candidate, the individual, political committee, or political fund shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy on the treasurer of the candidate's principal campaign committee. The affidavit must contain the information with respect to the expenditure that is required to be reported under subdivision 3, paragraph (g); except that if an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.

Minn. Stat. § 10A.20, subd. 6b(a) (Supp. 1993). The making of an independent expenditure also triggers the requirements of Minn. Stat. § 10A.25, subd. 13 (Supp. 1993), which provides:

> (a) The expenditure limits in this section are increased by the sum of independent expenditures made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents, other than expenditures by an association targeted to inform solely its own dues-paying members of the association's position on a candidate.
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> (b) Within 48 hours after receipt of an expenditure report or notice required by section 10A.20, subd. 3, 6, or 6b, the board shall notify each candidate in the race of the increase in the expenditure limit for the candidates against whom the independent expenditures have been made.
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> (c) Within three days after providing this notice, the board shall pay each candidate against whom the independent expenditures have been made, if the candidate is eligible to receive a public subsidy and has raised twice the minimum match required, an additional public subsidy equal to one-half the independent expenditures. The amount needed to pay the additional public subsidy under this subdivision is appropriated from the general fund to the board.

On its face, the public subsidy provision of subdivision 13(c) applies only if the opposed candidate is bound by the spending limits, is eligible to receive a public subsidy, and has raised twice the minimum match required by Minn. Stat. § 10A.323 (Supp. 1993). As discussed above, under Minn.

Stat. § 10A.31, subd. 6 (Supp. 1993), a candidate is eligible to receive the first available public subsidy if the candidate has won the primary election.[6]

The need for these new provisions addressing independent expenditures arose from the risk that independent expenditures pose to the viability of the State's statutory scheme relating to public subsidies and voluntary spending limits. A candidate who must decide whether to accept the campaign expenditure limitations must also take into account the fact that people and associations who oppose the candidate are free to make independent expenditures. The amount of these independent expenditures is not limited by law, since under this Court's decision in *Buckley*, independent expenditures cannot be limited without offending the First Amendment. 424 U.S. at 51. These independent expenditures can

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[6] Contrary to the Eighth Circuit's apparent belief, App. at A7-8 n.2, Minn. Stat. § 10A.25, subd. 13(c) (Supp. 1993) has no application to independent expenditures made in connection with a primary election but applies during the general election once candidates first become eligible for a public subsidy. The provision in subdivision 13(a), providing for an increase in spending limits, does, however, apply during the primary since that provision lacks the "eligibility" language of subdivision 13(c). The Eighth Circuit also questioned whether the public subsidy provision of the independent expenditure law is contrary to the other terms of Minnesota's campaign financing laws including, in particular, the requirement that no additional public subsidy be paid from the general account until *after* the election is over. App. at A8 n.2. The Board has, however, interpreted section 10A.25, subd. 13(c) to allow for payment of public subsidies after the primary election. Because the subsidies paid as a result of independent expenditures are paid out of a separate appropriation from the State's general fund, there is no irreconcilable conflict in the statutory scheme.

finance massive negative publicity campaigns against a candidate, without prior notice and very close to the date of the election, at a time when a candidate is already at or near the spending limits and/or out of money, thus leaving the targeted candidate unable to respond. The potential for such tactics may discourage candidates from accepting the voluntary limits because they may find themselves unable to counter such negative campaigning.

The independent expenditure provisions of Chapter 318 are also necessary because other provisions of Chapter 318 have greatly increased the likely role of independent expenditures in Minnesota elections. Prior to the enactment of Chapter 318, independent expenditures had not been a large factor in Minnesota elections. In the 1992 elections, total independent expenditures in Minnesota amounted to approximately $332,000, as compared to candidate spending of over $9 million. In 1993, Chapter 318 dramatically reduced contribution limits applicable to candidates and put restrictions on how much candidates may accept from certain sources. One of the foreseeable consequences of these new limits and restrictions is a "surplus" of money in the hands of individuals and groups who formerly gave very large donations to candidates, but who are now limited to much smaller contributions. This extra money is now available to be spent in other ways to influence the outcome of elections including, in particular, the making of independent expenditures. Thus, the inherent risk that adverse independent expenditures pose to a candidate who agrees to the statutory spending limits is now magnified because of the likelihood of increased independent expenditures and the potential that independent expenditures will play a much

more important role in influencing the outcome of elections in Minnesota. To preserve the viability of the voluntary spending limit program, it was necessary to counterbalance this risk.

Because independent expenditures may not constitutionally be limited, the Minnesota Legislature was required to address the problems that independent expenditures pose without imposing any limits on these expenditures. The legislature accomplished this goal by adopting Minn. Stat. §§ 10A.20, subd. 6b and 10A.25, subd. 13 (Supp. 1993). As discussed below, these laws in no way restrict the making of, or dictate the content of messages financed through, independent expenditures. Rather, they merely increase the spending restrictions of opposed candidates and give the opposed candidates some additional public subsidy to eliminate, or at least reduce, the risk that adverse independent expenditures pose to the voluntary spending limit program.

III. THE LOWER COURTS' RULINGS.

In the district court, Respondents moved for a preliminary injunction to enjoin the State from implementing or enforcing the independent expenditure provisions. The district court denied the motion in a Memorandum and Order filed on January 5, 1994. App. at A69 to A97. Respondents then moved for summary judgment on their claims. By judgment entered May 27, 1994, the district court upheld the independent expenditure provisions of Minn. Stat. ch. 10A. App. at A25 to A66. The district court reasoned that these provisions are content neutral in that the increase in spending limits and the public subsidy are triggered by the fact of an independent expenditure and

not the content of the speaker's message. *Id.* at A37. The court also noted that the law does not force those making such expenditures to use their own private resources to facilitate the speech of those they oppose. *Id.* In addition, the court observed that the statute does not in any way limit independent expenditures by restricting who can make them, how many can be made, or what message they can communicate. Accordingly, the court concluded that the independent expenditure provisions do not impose a significant restriction on free speech. *Id.*

The district court also rejected Respondents' contention that the independent expenditure provisions constitute an improper use of public funds. Citing prior decisions of this Court, *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) and *Rust v. Sullivan*, ___ U.S. ___, 111 S. Ct. 1759 (1991), the district court stated that the government is not obligated to subsidize all speech equally and that a content-neutral subsidy, like the statute in this case confers, does not violate the rights of those who do not receive the subsidy. App. at A38.

Finally, the district court concluded that the fact that the statute may require someone to make a strategic decision whether to make an independent expenditure does not make out a free speech violation. *Id.* at A38-39. Moreover, the court found that the statute actually advances First Amendment core values by facilitating even more speech insofar as the statute provides for enhanced debate on issues of public concern raised by independent expenditures. *Id.* at A39.[7]

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[7] The district court also rejected Respondents' vagueness and overbreadth challenges to the independent expenditure

Respondents filed an appeal to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed the district court's decision regarding the independent expenditure provisions and remanded the case to the district court for the entry of judgment and appropriate permanent injunctions against enforcement of the statutes. *Id.* at A14. With respect to Minn. Stat. § 10A.25, subd. 13 (Supp. 1993), the court of appeals stated that "[t]o the extent that a candidate's campaign is enhanced by the operation of the statute, the political speech of the individual or group that made the independent expenditure [opposing the benefited candidate] is impaired." *Id.* at A8. The court concluded that the statute has a "chilling effect" on the free exercise of protected speech because it induces "self-censorship" by persons who wish to make independent expenditures but do not wish to confer benefits on the candidates they oppose.[8] *Id.* at A9-10. Finding no compelling state interest for the law, the court struck section 10A.25, subd. 13 down as violative of the First Amendment. *Id.* at A11-14. Finally, the court held that Minn. Stat. § 10A.20, subd. 6b (Supp. 1993) is not severable from section 10A.25, subd. 13 and, therefore, must also fall. *Id.* at A15.

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reporting requirements in section 10A.20, subd. 6b (Supp. 1993). *Id.* at A40-48.

[8] In a footnote, the court also stated: "To the extent the statute encroaches upon the ability of 'like-minded persons to pool their resources in furtherance of political goals,' it also implicates 'protected associational freedoms.' " *Id.* at A9 n.3. The court did not hold, however, that the statute encroached upon the ability of persons to pool their resources to further political goals, and so this language is dicta.

REASONS FOR GRANTING THE PETITION

The Court should review this case because the decision of the court of appeals conflicts with First Amendment principles articulated in prior decisions of this Court and other circuit courts of appeals concerning the issue of whether laws that confer benefits on one person violate another person's free speech rights. Plenary review is warranted because this case presents an important issue of constitutional law that has potential nationwide ramifications.

I. THE DECISION OF THE COURT OF APPEALS THAT MINNESOTA'S INDEPENDENT EXPENDITURE PROVISIONS VIOLATE THE FIRST AMENDMENT BY CONFERRING A BENEFIT UPON OPPOSED CANDIDATES CONFLICTS IN PRINCIPLE WITH PRIOR FIRST AMENDMENT DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

As the district court correctly concluded, Minnesota's independent expenditure provisions do not violate the First Amendment in that they do not restrict anyone from making independent expenditures or in any way dictate the content of the messages communicated by those making such expenditures. Nor do they force individuals or associations to fund the expression of viewpoints they oppose. *Brookins v. O'Bannon*, 699 F.2d 648, 656 (3d Cir. 1983) ("Absent the imposition of a constitutional burden, there can be no constitutional penalty."). Nevertheless, the Eighth Circuit concluded that Minnesota's independent expenditure provisions chill the exercise of free speech simply by conferring benefits on candidates

opposed by those wishing to make such expenditures. As argued below, this Court has never recognized, and other federal courts have rejected, the principle that a statute violates the First Amendment merely by conferring a benefit on another in response to someone's protected speech.

This Court and several circuit courts have refused to find a constitutionally impermissible burden on free speech where the government subsidizes speech or otherwise provides a benefit to some persons engaged in political speech without providing the same benefit to others. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court upheld a statute which provided federal funds for presidential candidates who entered primary campaigns, but did not provide funds for candidates who did not run in party primaries. The Court rejected a First Amendment challenge to this provision because the statute did not restrict speech. *Id.* at 85-109. The Court stated that the statute was "a congressional effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93.

Moreover, in *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), the Court upheld two aspects of the "fairness doctrine" which requires a broadcaster to provide the opportunity to reply to personal attacks in the context of controversial public issues and to political editorializing. The Court found the doctrine to be "not inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs" even though the doctrine essentially compels a broadcaster to give a benefit –

namely, broadcast time – in response to another's exercise of protected speech. *Id.* at 392.[9]

Furthermore, in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), this Court upheld the denial of tax-exempt status to a non-profit corporation because it engaged in lobbying. Stating that a tax exemption is a form of subsidy, the Court noted that Congress had enacted a system providing a subsidy to non-profit civic welfare organizations generally and an additional subsidy to those that did not engage in substantial lobbying. The Court rejected TWR's First Amendment challenge, stating: "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying." *Id.* at 546. The Court further stated that:

> Where governmental subsidies are not " 'aimed at the suppression of dangerous ideas,' " its "power to encourage actions deemed to be in the public interest is necessarily far broader."

Id. at 550 (citations omitted).[10]

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[9] In *Buckley*, the Court rejected the fairness doctrine as a rationale for justifying *restrictions* on independent expenditures. 424 U.S. at 49 n.55. This case, however, does not involve a law which imposes restrictions on independent expenditures.

[10] The district court also cited this Court's decision in *Rust v. Sullivan*, ___ U.S. ___, 111 S. Ct. 1759 (1991). In *Rust*, the Court upheld, against a First Amendment challenge, government regulations prohibiting recipients of federal family planning funds from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. The Court stated: "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time

Several circuit courts of appeals have also rejected the notion that the mere granting of a benefit to someone violates another's free speech rights. In *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993), the First Circuit concluded that the Rhode Island program for public financing of the gubernatorial campaign, which provides incentives for candidates to accept public campaign funds (and accompanying overall spending limitations), "furthers, rather than smothers, first amendment values." *Id.* at 39. Under the state statutory scheme, candidates who agreed to accept public funding could accept contributions of up to $2,000 annually from any person or political action committee. This was double the usual contribution limit of $1,000 which applies to contributions to privately-funded candidates, creating what the court referred to as a "contribution cap gap." Plaintiffs in *Vote Choice* contended that the contribution cap gap violated a privately-funded candidate's First Amendment rights because the cap gap was not an incentive to accept public financing, but rather a penalty that was impermissible. The First Circuit disagreed and concluded that the contribution cap gap "neither penalizes certain classes of office-seekers nor coerces candidates into surrendering their First Amendment rights." *Id.* at 39.

The facts in this case are also similar to those in *Brookins v. O'Bannon*, 699 F.2d 648 (3d Cir. 1983), in which

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funding an alternate program which seeks to deal with the problem another way." *Id.* at 1772. *See also Planned Parenthood v. Agency for Int'l Dev.*, 915 F.2d 59, 63 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2257 (1991) (government decision not to subsidize exercise of fundamental right not subject to strict scrutiny because it places no government obstacle in the path of a person seeking to exercise the right).

the Third Circuit held that a statute which forced an association to make an unpleasant choice as to its priorities did not violate the plaintiffs' First Amendment rights. In *Brookins*, two statutes were enacted, one raising welfare benefit levels for one class of needy persons and the other lowering them for another class of needy persons. A non-severability clause made the two statutes inseparable – a successful challenge to one statute would result in the striking down of both. An organization that represented the interests of all needy persons claimed that the non-severability clause burdened its freedom to associate because a lawsuit challenging one of the statutes would inevitably be against the interest of a portion of its membership, leaving the association with a difficult choice. The court rejected the argument that the non-severability clause burdened the plaintiffs' associational rights or their right of access to the courts. Finding no burden on plaintiffs' rights, the court upheld the statute. *Id.* at 656.

These decisions support Petitioners' argument that a statute does no violence to the First Amendment merely because it confers a benefit on someone because of another's exercise of protected speech rights. That is precisely what Minnesota's independent expenditure provisions do. They do not prevent anyone from making an independent expenditure or regulate in any way the content of the message communicated through the expenditure. Rather, the statute only raises the spending limits of, and provides a public subsidy to, the candidates against whom such independent expenditures are made.[11] Someone wishing to make an independent expenditure opposing a particular candidate will

[11] While the court of appeals failed to note this distinction, the increase in an opposed candidate's spending limit is not a benefit to a candidate, like a subsidy. It is, rather, merely the

admittedly have to choose whether to make the expenditure and thereby trigger the benefit discussed above, or not make the expenditure at all. There is simply no constitutionally impermissible chilling effect in having to make such a choice as made clear in the above-discussed cases.

Not only did the Eighth Circuit fail to discuss or distinguish the above-cited cases, but it relied upon a decision of this Court that does not support its decision in this case. The court of appeals cited *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1958), in support of its conclusion that the "self-censorship" effect of the independent expenditure provisions is just as much an impermissible burden on free speech as direct government censorship. App. at A10. At issue in *City of Lakewood* was a city ordinance that gave the mayor total authority to grant or deny applications for newsrack permits. The Court found that the mayor's unbridled discretion to deny such permits could result in self-censorship insofar as a newspaper could be influenced in what it printed by its desire to obtain permits for its newsracks. *Id.* at 757-58.

The independent expenditure provisions are not even remotely analogous to the ordinance in *City of Lakewood*. While the newspaper in that case was legitimately concerned that it would be denied permits if it published any

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removal of a potential impediment to the candidate's response that would not exist but for the candidate's voluntary acceptance of the spending limits in order to participate in the public campaign funding. A state could certainly provide a subsidy to a candidate without any spending cap. It should, therefore, also be able to partially increase a limit to provide a candidate a fair opportunity to reply to an independent expenditure in order to promote a voluntary spending limit program.

stories critical of the mayor, there is no similar risk of self-censorship in this case. In *City of Lakewood*, the newspaper feared it would be punished or penalized for its expression of protected speech. In this case, on the other hand, Respondents' only argument, and the one upon which the court of appeals relied, is that others who they oppose will be benefited if they exercise their free speech rights. As discussed above, this Court has not found, and should not find, that the government violates someone's free speech rights by assisting another in responding to that speech. That is scarcely the kind of self-censorship this Court was concerned with in *City of Lakewood*.[12]

The independent expenditure provisions at issue in this case are also much different than the types of laws which have been held by this Court to penalize the exercise of freedom of speech. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Pacific Gas & Electric v. Public Utilities Commission of California*, 475 U.S. 1 (1986) ("*PG&E*"). In *Miami Herald*, the statute provided that if a candidate was assailed by any newspaper regarding his personal character or official record, the candidate had the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate might make to the newspaper's charges. 418 U.S. at 256, 258. In *PG&E*, a utility was ordered to place in its billing envelopes the newsletter of a group called Toward Utility Rate Normalization ("TURN"). In both those cases, the plaintiffs were required to use their own communication resources to

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[12] In fact, as the district court correctly observed in this case, the independent expenditure provisions actually facilitate more speech insofar as they increase debate about issues of public concern raised by the expenditures. App. at A39.

disseminate someone else's message. That is not the case here. In addition, in *PG&E*, the message which the utility was forced to disseminate was a message potentially hostile to the utility itself. The Court stated:

> The Commission's order forces appellant to disseminate TURN's speech in envelopes that appellant owns and that bear appellant's return address. Such forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent.

Id. at 18. In each case, the statute "forced the speaker's opponent – not the taxpaying public – to assist in disseminating the speaker's message." *Id.* at 16. The statute at issue here imposes no such penalty. Moreover, to the extent the statute can be said to facilitate the dissemination of the speaker's – the opposed candidate's – message in response to an independent expenditure, it does so through the use of *public* funds and not the funds of those like Respondents in this case.

The fundamental flaw in the court of appeals' decision is its conclusion that a state cannot confer a benefit on someone in response to another's protected speech. This basic principle is in conflict with decisions of this Court and several circuit courts. Respondents would like the law to be that if they engage in protected speech, the government cannot do anything that might help another to respond to that speech. In other words, Respondents claim not only to have a constitutional right to engage in protected speech, but also to have a further constitutional right to prevent the government from facilitating a fair opportunity to respond by candidates who have agreed

to participate in the state's voluntary spending limit/public subsidy system. Suffice it to say, the First Amendment has never been extended that far and this Court should review this case and say so directly.

Even if Minnesota's independent expenditure provisions could be construed as a burden on free speech, they must be upheld because they are "narrowly tailored to serve a compelling governmental interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665 (1990).[13]

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[13] The court of appeals decided that the independent expenditure provisions should be subject to this highest level of scrutiny because it found the statute to be content-based insofar as an independent expenditure triggers the subsidy and limit-increasing provisions only to the extent that it favors or opposes a particular candidate. App. at A10-11. This Court recently stated that the principle inquiry in determining content neutrality is "whether the government has adopted a regulation of speech because of [agreement] or disagreement with the message it conveys." *Turner Broadcasting System v. FCC*, ___ U.S. ___, 114 S. Ct. 2445, 2459 (1994). In adopting the independent expenditure provisions, the State has not expressed any favoritism toward or disagreement with any messages that might be conveyed through such expenditures. To the contrary, the law is utterly indifferent to the content of the messages and, in fact, applies equally to independent expenditures communicating diametrically opposite viewpoints concerning exactly the same issue. At worst then, if the independent expenditure provisions restrict speech at all, they do so based on the subject matter rather than the viewpoint of the speech. As such, they should be subject to a lesser level of scrutiny than viewpoint-based restrictions. *See R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S. Ct. 2538, 2569 (1992) (Stevens, J., concurring) ("[I]n general, viewpoint-based restrictions on expression require greater scrutiny than subject-matter based restrictions."). Even if the independent expenditure provisions are subjected to the highest level of scrutiny as applied in *Austin*, however, they are nevertheless constitutional for the reasons discussed herein.

As a whole, the provisions of Minn. Stat. ch. 10A and Chapter 318 are designed to enhance the public's confidence in the political process by encouraging candidates to accept campaign expenditure limitations and by regulating the flow of money directly into campaigns to reduce the influence of wealthy special interest groups. With the severe restrictions imposed by Chapter 318 on contributions to candidates, the legislature felt the need to address independent expenditures, which do not directly flow into campaigns but which nevertheless play a role in influencing the outcome of elections. This role is expected to be even larger than it was in the past because money which was likely in the past to be spent on contributions to candidates is now more likely to be spent instead on independent expenditures.

The legislature has tried to encourage candidates to voluntarily adopt spending limits and accept public subsidies. Candidates facing the potential for unlimited independent expenditures being made against them might reject the limits for fear of being unable to respond adequately. As this Court recognized in *Buckley*, there is a benefit to the public in general if candidates accept public subsidies and thus reduce their need to aggressively solicit contributions.

> In this case, Congress was legislating for the "general welfare" – to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising.

424 U.S. at 91. Reducing the candidates' need to solicit contributions also reduces the potential for the corruption or the appearance of corruption that can result from large

contributions and gives candidates more time to meet voters and publicly debate the issues. The legislature believes that the independent expenditure provisions are an important part of the State's public campaign financing scheme.

The Eighth Circuit erred in holding that because candidate participation in Minnesota's public campaign financing was nearly 100 percent before the enactment of section 10A.25, subd. 13, the State has no legitimate interest in providing further incentives for candidates to accept the voluntary spending limits and public subsidies. App. at A12. If anything, the high participation rates before the enactment of the new law *heightens* the State's interest in seeing that these rates do not drop significantly as a result of the increased likelihood that more independent expenditures will be made against candidates in the future.

Moreover, participation rates near 100 percent in the past certainly do not guarantee full participation rates in the future. The record in this case shows that, in the past, participation rates have fluctuated. For example, in 1982, the participation rate for all candidates was 89 percent. By the 1986 election, the rate had dropped to 80 percent. In 1988, it rose again to 89 percent. It cannot be said with assurance that without the package of incentives provided in the law, including the independent expenditure provisions, the figure will not drop significantly in the future. Because the maintenance of a high participation rate in the public campaign financing statutory scheme is directly related to the State's compelling interest in preventing corruption or the appearance of corruption in the election of its government officials, the independent

expenditure provisions are constitutional even if they do burden free speech.

II. THIS CASE PRESENTS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW THAT HAS POTENTIAL NATIONWIDE RAMIFICATIONS.

As discussed above, this case presents a fundamental issue of First Amendment law – namely, whether the government violates the free speech rights of someone when it helps someone else respond to that speech. The resolution of this issue is, of course, very important to the citizens of the State of Minnesota insofar as the independent expenditure provisions are an integral part of the public campaign financing scheme that the Minnesota Legislature enacted to promote fairness and public confidence in the political process. As noted above, this Court has expressly recognized the many benefits of public financing of political campaigns.

The issue in this case also has potential nationwide importance, as just last session Congress considered nearly identical provisions in two federal campaign reform bills. Under the bill passed by the Senate, eligible candidates would receive federal funds to offset any independent expenditure of $10,000 or more ($1,000 or more in the 20 days preceding the election). The use of the federal subsidy would also not count against the candidates' spending limits. S. 3, 103d Cong., 1st Sess., § 604 (1993). Similarly, under the bill passed by the House, candidates would receive communications vouchers (which could be used to purchase broadcast time, print advertisements, or campaign materials or

defray postage expenses) to offset independent expenditures totaling $10,000 or more and the vouchers would not count against the candidates' spending limits. H.R. 3, 103d Cong., 1st Sess., § 604 (1993).[14] The two bills also contained independent expenditure reporting obligations very similar to those in the Minnesota law. S. 3 at § 133; H.R. 3 at § 301.

The House Committee on Administration discussed the growing national concern over independent expenditures and echoed a number of the points made by Petitioners in this case:

> We must especially take care in assuring that no candidate who participates in the voluntary system and thus agrees to limits on his or her ability to raise and spend money is not [sic] ambushed by an outside group, free to spend all it wishes, with the candidate being unduly restrained to respond effectively.
>
> . . . .
>
> These provisions adhere to First Amendment values by allowing for an increase in debate and an increase in the voices which may be heard. We emphasize that the persons making the independent expenditures are not restricted; they may do so in unlimited amounts. Thus, these provisions enhance the ability to speak, thus, living up to the admonition of the Supreme Court in *Buckley* that "[l]egislation to enhance First Amendment values is the rule, not the exception." (citation omitted).

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[14] In addition, under the two bills, broadcasters would be required to permit candidates time to respond to advertisements funded by independent expenditures. S. 3 at § 202; H.R. 3 at § 303.

H.R. Rep. No. 103-375, 103d Cong., 1st Sess., pt. 1, at 53 (1993).

The Court's resolution of the constitutionality of such independent expenditure provisions would aid Congress in its continuing debate over national election reform. Moreover, this case presents an excellent opportunity for the Court to clarify the contours of First Amendment law in this area.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: November 30, 1994

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2387

Scott Day, Treasurer of IMPACE-MEA; IMPACE-MEA, a Political Fund; Steve Frazier, a Minnesota taxpayer and contributor to IMPACE-MEA; Richard Kimbler, a taxpayer and an Independent Republican candidate for Secretary of State,

Appellants,

v.

John L. Holahan, Jr., in his capacity as Chair of the Ethical Practices Board, or his successor,

Appellee.

Appeals from the United States District Court for the District of Minnesota.

No. 94-2388

Minnesota Citizens Concerned for Life, Inc.,

Appellant,

Jacqueline A. Schwietz, individually and as Treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates; Eileen Angell,

Plaintiffs,

Mitchell Hoyt Unruh; Lorie Erickson,

Appellants,

v.

John L. Holahan, Jr., in his capacity as Chair of the Ethical Practices Board; Hubert H. Humphrey, III, in his capacity as Attorney General of the State of Minnesota,

Appellees.

No. 94-2390

Minnesota Citizens Concerned for Life, Inc.,

Plaintiff,

Jacqueline A. Schwietz, individually and as Treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates,

Appellant,

Eileen Angell; Mitchell Hoyt Unruh; Lori Erickson,

Plaintiffs,

v.

John L. Holahan, Jr., in his capacity as Chair of the Ethical Practices Board; Hubert H. Humphrey, III, in his capacity as Attorney General of the State of Minnesota,

Appellees.

No. 94-2587

Minnesota Citizens Concerned for Life, Inc.; Jacqueline A. Schwietz, individually and as Treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates; Eileen Angell; Mitchell Hoyt Unruh; Lori Erickson,

Appellees,

v.

John L. Holahan, Jr., in his capacity as Chair of the Ethical Practices Board; Hubert H. Humphrey, III, in his capacity as Attorney General of the State of Minnesota,

Appellants.

Submitted: August 4, 1994

Filed: September 1, 1994

Before BOWMAN and LOKEN, Circuit Judges, and STEVENS,* District Judge.

BOWMAN Circuit Judge.

These consolidated appeals and a cross-appeal challenge the District Court's decision granting summary judgment for and against the appellants and cross-appellees on various constitutional challenges to sections of the campaign reform laws enacted during Minnesota's 1993 legislative session. We granted expedited review of the District Courts' orders. Having reviewed *de novo* the decision to grant summary judgment (there are no disputed issues of fact), we now affirm in part and reverse in part, and remand to the District Court.

IMPACE-MEA is the registered political fund of the Minnesota Education Association, and Scott Day is treasurer of the fund. Steve Frazier is a contributor to IMPACE-MEA and Richard Kimbler is a candidate for Minnesota secretary of state. We will refer to these appellants (plaintiffs below) collectively as IMPACE.

Minnesota Citizens Concerned for Life, Inc., is a nonprofit corporation organized under Minnesota law. Mitchell Hoyt Unruh intends to be a candidate for the Minnesota House of Representatives this year (presumably by now that intent is a reality) and to be bound by the applicable Minnesota campaign finance and ethics laws.

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* The HONORABLE JOSEPH E. STEVENS, JR., Chief Judge, United States District Court for the Western District of Missouri, sitting by designation.

Lori Erickson was a candidate for the Minnesota Senate in 1990 and 1992, plans to run again in 1996, and likewise intends to be bound by applicable state law. We will refer to these appellants (plaintiffs below) collectively as MCCL.

Appellant and cross-appellee Jacqueline A. Schwietz (a plaintiff below) is treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates (MCCL-CSPC), a political fund. Cross-appellee Eileen Angell (a plaintiff below) is a contributor to MCCL-CSPC.

Appellee and cross-appellant John L. Holahan Jr. (a defendant below) is chairman of the Minnesota Ethical Practices Board,[1] which is responsible for the administration, interpretation, and enforcement of the statutes at issue in this case. Appellee and cross-appellant Hubert H. Humphrey III (a defendant below) is Minnesota Attorney General. We will refer to Holahan and Humphrey, collectively or individually, as the state.

I.

A.

Among the 1993 changes and additions to the Minnesota campaign finance and ethics laws was this provision directed to independent expenditures:

> **independent expenditures; limits increased.** (a) The expenditure limits in this section are increased by the sum of independent

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[1] Holahan was substituted for Vanne Owens Hayes, who was the chairman of the Minnesota Ethical Practices Board when plaintiffs filed suit.

> expenditures made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents, other than expenditures by an association targeted to inform solely its own dues-paying members of the association's position on a candidate.
>
> (b) Within 48 hours after receipt of an expenditure report or notice required by section 10A.20, subdivision 3, 6, or 6b, the board shall notify each candidate in the race of the increase in the expenditure limit for the candidates against whom the independent expenditures have been made.
>
> (c) Within three days after providing this notice, the board shall pay each candidate against whom the independent expenditures have been made, if the candidate is eligible to receive a public subsidy and has raised twice the minimum match required, an additional public subsidy equal to one-half the independent expenditures. The amount needed to pay the additional public subsidy under this subdivision is appropriated from the general fund to the board.

Minn. Stat. § 10A.25 subd. 13 (Supp. 1993).

IMPACE, Schwietz, and MCCL make several constitutional challenges to this statute. Because we hold that it violates the First Amendment, we do not reach the other constitutional issues raised.

The District Court concluded that section 10A.25 subd. 13 was content-neutral and was not restrictive of speech (the latter conclusion making the first irrelevant), and ended its analysis there. We think the District Court

took too narrow an approach in considering whether section 10A.25 subd. 13 restricts speech and whether the restriction is content-based, and therefore erred in holding that the First Amendment was not implicated.

Under Chapter 10A of the Minnesota Statutes, an independent expenditure is defined as "an expenditure expressly advocating the election or defeat of a clearly identified candidate," but one made neither with the consent or authorization of the candidate nor at his request or suggestion. *Id.* § 10A.01 subd. 10b (Supp. 1993). Once any individual, political committee, or political fund makes (or becomes obligated to make) an independent expenditure of more than $100 on behalf of any candidate, or against any candidate, the following scenario is mandated by section 10A.25 subd. 13:

The candidate whose defeat is advocated (or whose opponent's election is encouraged) by the independent expenditure has her own expenditure limits increased by the amount of the independent expenditure. *Id.* § 10A.25 subd. 13 (a). The Minnesota Ethical Practices Board then must pay her, if she is eligible to receive a public subsidy and has raised two times the minimum amount required for a match, an additional public subsidy equal to one-half the amount of the independent expenditure.[2] Thus,

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[2] There seems to be a genuine question here whether the Minnesota Ethical Practices Board can implement this statute and still comply with the terms of other Minnesota campaign finance laws. Section 10A.25 subd. 13 requires that the additional subsidy be paid six days (by the time all the statutory notices are given) after the independent expenditure is made (or obligated to be made). It does not exclude independent

by advocating a candidate's defeat (or her opponent's victory) via an independent expenditure, the individual, committee, or fund working for the candidate's defeat instead has increased the maximum amount she may spend *and* given her the wherewithal to increase that spending – merely by exercising a First Amendment right to make expenditures opposing her or supporting her opponent. Thus the individual or group intending to contribute to her defeat becomes directly responsible for adding to her campaign coffers. To the extent that a candidate's campaign is enhanced by the operation of the statute, the political speech of the individual or group who made the independent expenditure "against" her (or in favor of her opponent) is impaired.

It is clear that independent expenditures are protected speech. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our

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expenditures made against primary candidates from the calculation of the additional subsidy, yet such candidates cannot be paid an additional public subsidy because they are ineligible for *any* public subsidy until they win the primary. *See* Minn. Stat. § 10A.31 subd. 6 (Supp. 1993). The state acknowledges this outcome. Brief for Appellee/Cross-Appellant at 7 ("Therefore, Minn. Stat. § 10A.25, subd. 13 (Supp. 1993), has no application to independent expenditures made in connection with a primary election."). By the same token, winning primary candidates will not be eligible for a public subsidy unless and until they win five percent or ten percent (depending upon the office sought) of the total vote in the general election. Minn. Stat. § 10A.31 subd. 7 (Supp. 1993). Since election results must be certified before this determination can be made, there seem to be no circumstances in which the Board will be able to pay the additional subsidy within the six days required by law.

Constitution. The First Amendment affords the broadest protection to such political expression. . . . " *Buckley v. Valeo,* 424 U.S. 1, 14 (1976) (per curiam).[3] It is equally clear that section 10A.25 subd. 13 infringes on that protected speech because of the chilling effect the statute has on the political speech of the person or group making the independent expenditure. As the potential "independent expenders" allege in their briefs (and as at least one sponsor of the legislation intended[4]), the mere enactment of section 10A.25 subd. 13 already has prevented many if not most potential independent expenditures from ever being made. The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditures, chills the free exercise of that protected speech. This "self-censorship" that has occurred even before the state implements the statute's mandates is no less a burden on speech that is

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[3] To the extent the statute encroaches upon the ability of "like-minded persons to pool their resources in furtherance of common political goals," it also implicates "protected associational freedoms." *Buckley v. Valeo,* 424 U.S. 1, 22 (1976) (per curiam).

[4] The appellants offered evidence that senator John Marty, then chairman of the Senate Ethics and Campaign Reform Committee and chief author of the senate bill, explained to the Senate Committee on Finance how the legislation would prevent or dramatically limit independent expenditures, a goal that he recognized could not be accomplished directly because it would violate the First Amendment. *See* Affidavit of Frank J. Walz at 10-12 (Feb. 23, 1994).

susceptible to constitutional challenge than is direct government censorship. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988).

Our conclusion that the most fundamental of rights is infringed by Section 10A.25 subd. 13 does not end our inquiry, however. We now must decide whether the statute is content-neutral or content-based, "not always a simple task." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994). But that determination is critical, as it controls the level of scrutiny we apply in assessing whether the infringement results in a constitutional violation. Having reviewed the teachings of the Supreme Court on this subject and applied them to this statute, we conclude that section 10A.25 subd. 13 is content-based.

Section 10A.25 subd. 13 singles out particular political speech – that which advocates the defeat of a candidate and/or supports the election of her opponents – for negative treatment that the state applies to no other variety of speech. *See Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992) ("Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech. . . . "). We have no difficulty concluding that this is a statute that "by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed," and thus it cannot be content-neutral. *Turner Broadcasting*, 114 S. Ct. at 2459. Independent expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger the statute's limit-increasing and money-shifting provisions. We are bound to

"apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.*

Notwithstanding the content-based infringement on protected constitutional rights perpetrated by section 10A.25 subd. 13, the statute may be upheld as against constitutional challenge if the state can show that it is narrowly drawn to serve a compelling state interest. *See Boos v. Barry*, 485 U.S. 312, 321 (1988). We hold that the state has made no such showing.

The state's professed interest "is the goal of enhancing the public's confidence in the political process by ensuring the viability of the legislature's statutory scheme designed to encourage candidates to accept the voluntary campaign expenditures [sic] of section 10A.25 and the accompanying public subsidies." Brief of Appellee/Cross-Appellant at 23. While this may be a noble goal, we are not certain it is a sufficiently "compelling" interest to justify the burden that the statute imposes upon speech. We do not decide that issue, however, because we hold that, with candidate participation in public campaign financing nearing 100% *before* enactment of section 10A.25 subd. 13, the interest, no matter how compelling in the abstract, is not legitimate.

In 1988, eighty-nine percent of candidates for the Minnesota House of Representatives agreed to spending limits. State of Minnesota Ethical Practices Board, Ethical Practices Board Issues Summary of 1992 Campaign Finance Reports for State Candidates, Political Committees, and Political Funds 2 (July 2, 1993). In 1990, the total for all state candidates was ninety-six percent, and in

1992 – still before the enactment of the campaign reform legislation challenged here – ninety-seven percent of the state legislative candidates filing for office agreed to abide by spending limits in order to receive a public subsidy.[5] *Id.* Clearly, the campaign reform legislation was not necessary to encourage candidates' involvement in public campaign financing, as participation was approaching 100% before the new campaign finance laws were passed in 1993.[6] One hardly could be faulted for concluding that this "compelling" state interest was contrived for purposes of this litigation.

Moreover, it occurs to us that no statute that infringes on First Amendment rights can be considered "narrowly tailored" to meet the state's purported interest in these circumstances. Surely the three percent of non-participants could be brought in by means less burdensome to constitutional rights – assuming that group can be brought in at all. In any event, we have our doubts that this statutory scheme would achieve much success in increasing candidate participation in public campaign financing, when the chances of picking up the "bonus"

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[5] Because the statistics for the three years were for different groups of candidates, it is not possible to compare the figures directly. Nevertheless, there is no argument from the state contesting the proposition that participation in the public campaign financing scheme is very high, nearing 100%.

[6] To the extent that the state's brief can be read as arguing that the level of candidate participation in publicly financed campaigns may be eroded in the absence of these limitations on the speech and association rights of those who wish to make independent expenditures, the argument lacks factual support and must be regarded as wholly speculative.

subsidy are so remote. A candidate cannot qualify for the additional subsidy unless particular speech is made against her (or in favor of her opposition) by others who, as we noted above, are discouraged from exercising their rights to so speak by the very same statutory scheme that provides for the bonus subsidy. We have no doubt that section 10A.25 subd. 13 is assuredly *not* "necessary to serve the asserted interest." *Burson,* 112 S. Ct. at 1852 (1992).

Even if we were to hold that the statute is content-neutral and thus "pose[s] a less substantial risk of excising certain ideas or viewpoints from the public dialogue," *Turner Broadcasting,* 114 S. Ct. at 2459, we nevertheless would conclude that it violates the First Amendment even examining it with the less exacting scrutiny required when the infringement on speech is content-neutral.

A content-neutral statute will survive a First Amendment challenge if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 2469 (quoting *United States v. O'Brien,* 391 U.S. 367, 377 (1968)). Regardless of whether or not the asserted governmental interest in instilling public confidence in the election process is "substantial," section 10A.25 subd. 13 cannot logically be characterized as "essential" to furthering the state's interest. As discussed above, no more than an additional three percent of all candidates could be brought into the public campaign financing scheme (given that ninety-seven percent

already participate). Therefore, even if section 10A.25 subd. 13 were content-neutral, the statute's negative impact on political speech must be a violation of the First Amendment rights of those who wish to make the independent expenditures at issue. The statute's burden on First Amendment rights does not satisfy strict, intermediate, or even the most cursory scrutiny.

We remand to the District Court with instructions to enter judgment for the plaintiffs on this issue and to permanently enjoin the implementation of section 10A.25 subd. 13 of the Minnesota Statutes.

B.

IMPACE and Schwietz also challenge the companion independent expenditure reporting and notice statute, Minn. Stat. § 10A.20 subd. 6b (Supp. 1993), as unconstitutionally vague and overbroad. We do not consider those arguments, as we conclude that section 10A.20 subd. 6b cannot stand in light of our holding that section 10A.25 subd. 13 is unconstitutional.

The Minnesota campaign ethics law provides detailed requirements for the reporting of election campaign expenditures, including independent expenditures, separate and apart from those found in section 10A.20 subd. 6b. *See* Minn. Stat. § 10A.20 (1992 & Supp. 1993). Therefore the requirements of section 10A.20 subd. 6b may be redundant in serving any legitimate purpose and thus unconstitutionally burdensome even if section 10A.25 subd. 13 were constitutionally sound. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 92 (1982) (noting "three government interests sufficient in

general to justify requiring disclosure of information concerning campaign contributions and expenditures: enhancement of voters' knowledge about a candidate's possible allegiances and interests, deterrence of corruption, and the enforcement of contribution limitations") (footnote omitted). But section 10A.25 subd. 13 violates the First Amendment, and subdivision 6b of section 10A.20 is directed exclusively to independent expenditures, clearly for the purpose of implementing subdivision 13 of section 10A.25. With section 10A.25 subd. 13 declared unconstitutional, the state cannot "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963). We hold that section 10A.20 subd. 6b is not severable from section 10A.25 subd. 13. Because the latter subdivision is unconstitutional, the former subdivision also must fall.

We remand to the District Court with instructions to enter judgment for the plaintiffs on this issue and to enjoin permanently the enforcement of section 10A.20 subd. 6b of the Minnesota Statutes.

II.

MCCL argues that the District Court erred in granting summary judgment to the state on MCCL's challenge to three provisions of Minnesota's fair campaign practices law that concern corporate political contributions, Minn. Stat. § 211B.15 (Supp. 1993).

MCCL contends that the subdivision prohibiting corporations from making independent expenditures to promote the election or defeat of a candidate, *id.* § 211B.15 subd. 3, is vague and overbroad. MCCL further argues that the subdivision that restricts corporate expenditures concerning the appointment of public officials and forbids a corporation's contribution of the "free service of its . . . members," *id.* § 211B.15 subd. 2, violates the First Amendment. Finally, MCCL challenges as unconstitutional as applied to it the limited statutory exemption of nonprofit corporations from the balance of the section on corporate political contributions. *Id.* § 211B.15 subd. 15. Our decision on the challenge to section 211B.15 subd. 15 makes it unnecessary for us to consider the other issues.

The "nonprofit corporate exemption" relieves a nonprofit corporation from the corporate prohibitions set forth under section 211B.15 (including the prohibitions set forth in subdivisions 2 and 3) if that corporation:

> (1) cannot engage in business activities;
>
> (2) has no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and
>
> (3) was not established by a business corporation or a labor union and has a policy not to accept significant contributions from those entities.

Id. § 211B.15 subd. 15.

The state acknowledges that these three conditions are drawn from the Supreme Court's opinion in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263-64 (1986) (hereinafter *MCFL*). The Minnesota legislature

looked at three features of MCFL that, in the Supreme Court's view, qualified MCFL for exemption, and translated them into requirements for exemption under Minnesota law. The state claims that, because MCCL's activities did not strictly conform to the statute (MCCL engages in incidental business activities and has no policy of refusing significant contributions from corporations), MCCL is not exempt from the prohibitions of section 211B.15. We disagree, and hold that section 211B.15 subd. 15 is unconstitutional as applied to MCCL.

The general corporate restrictions on political speech as they appear in section 211B.15 could be declared unconstitutional if they were applied to nonprofit corporations organized solely for political purposes, as the "practical effect may be to discourage protected speech." *MCFL*, 479 U.S. at 255 (plurality opinion). The state interest in preventing corruption, or the appearance of corruption, in the political process has been recognized as a compelling state interest that justifies restrictions on political contributions by business corporations. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990). But those same corporate campaign finance restrictions, if applied broadly to all nonprofit corporations, are not narrowly tailored to serve that purpose. *See id.* at 660. The state does not contend otherwise, and to avoid potential constitutional problems the Minnesota legislature enacted section 211B.15 subd. 15, the exemption for certain nonprofit corporations.

As noted above, the conditions that nonprofit corporations must meet to qualify for the exemption were taken from the Minnesota legislature's reading of the Supreme Court's opinion in *MCFL*. But the analysis in

MCFL, upon which section 211B.15 subd. 15 was based, is not a constitutional test for when a nonprofit corporation must be exempt. Instead it is an application, in three parts, of First Amendment jurisprudence to the facts in *MCFL*. The state goes too far in concluding that the factual findings of *MCFL* translate into absolutes in legal applications.

Two of the subsections under section 211B.15 subd. 15 pose problems for MCCL's qualification as an exempt nonprofit corporation as the state applies the statute to MCCL. First, MCCL engages in some minor business activities that generate minimal income but are incidental to its political purpose: it rents its mailing list and sells advertisements in its newsletter. The statute says MCCL "cannot engage in business activities" and still qualify as an exempt nonprofit. Minn. Stat. § 211B.15 subd. 15(1). The Supreme Court in *MCFL*, in noting MCFL's avoidance of business activity as a reason to exempt it from Massachusetts's campaign regulations for corporations, set forth a rationale for its conclusion that is more relevant here than the particular fact that MCFL did not engage in business activities. The Court concluded that the lack of business activity "ensures that political resources reflect political support." *MCFL*, 479 U.S. at 264. MCCL describes its own business activities as incidental to its political purposes, and the income derived from them as minimal, and the state does not dispute those contentions. Moreover, the business activities in which MCCL engages, we believe, would not draw income from those who were not supportive of MCCL's political agenda and thus such income would manifest political support. It is reasonable to assume that only

those who are like-minded would pay for the use of MCCL's mailing list.[7] As for the newsletter, again presumably only those sympathetic to MCCL's views would pay to place an advertisement that would be read by MCCL supporters. *Cf. supra* note 6. So looking to the purpose of this condition for exemption and the facts here, rather than merely the factual application in *MCFL*, we hold that section 211B.15 subd. 15(1) as applied to MCCL to render it non-exempt, on the facts before us at this time, results in an unconstitutional infringement on MCCL's First Amendment rights.

MCCL also runs afoul of Minnesota's conditions for nonprofit exemption because it does not have "a policy not to accept significant contributions" from business corporations or labor unions. Minn. Stat. § 211B.15 subd. 15(3). In fact, it has accepted corporate contributions. The state does not dispute MCCL's claim that the contributions are not "significant," but faults MCCL because it does not have a "policy" not to accept significant contributions. Again we consider the purpose underlying the Supreme Court's conclusion that this particular fact of MCFL's operations should relieve it of the campaign finance burdens that Massachusetts put upon for-profit corporations, rather than relying only upon the factual finding itself.

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[7] The exception here would be some aberrant plan to use the mailing list to harass MCCL's supporters. We assume that MCCL screens requests for its mailing list to filter such uses. In any event the list-renter would know that the fee he pays is going to support MCCL's activities.

The Supreme Court concluded that MCFL's refusal to accept significant corporate contributions "prevents such corporations [as MCFL] from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 264. This statement from the Court convinces us that the key issue here is the *amount* of for-profit corporate funding a nonprofit receives, rather than the establishment of a policy not to accept significant amounts. Unlike the situation in *Austin*, where the nonprofit organization was a chamber of commerce three-fourths of whose members were business entities, the facts before us in this case present no risk of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. The state, far from having shown that MCCL is amassing great wealth as a result of corporate donations, implicitly concedes that MCCL has not received any significant contributions from for-profit corporations.

"Some corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." *MCFL*, 479 U.S. at 263. MCCL, despite its failure to fit precisely into the facts of *MCFL*, is clearly that sort of corporation. We hold that section 211B.15 subd. 15 is unconstitutional as applied to MCCL, and that the facts before us today should qualify MCCL for exempt nonprofit status. Should these facts change, however, particularly as to the amount of revenue MCCL receives from

its business activities, the business activities that produce the revenue, or the amount of contributions it receives from for-profit corporations or labor unions, the state may wish to revisit MCCL's qualification for the exemption.

We remand to the District Court with instructions to enter judgment for MCCL on its claim concerning the application of section 211B.15 subd. 15.

III.

For its cross-appeal, the state claims the District Court erred in granting summary judgment for Schwietz and Angell, finding Minn. Stat. § 10A.27 subd. 12 (Supp. 1993) unconstitutional and enjoining its enforcement. Under that section of the campaign reform law, a political committee or political fund cannot "accept aggregate contributions from an individual, political committee, or political fund in an amount more that [sic] $100 a year." *Id.* We hold that the $100 limit is so low as to infringe upon the citizens' First Amendment right to political association and free political expression.

As emphasized by the Supreme Court's decision in *Buckley v. Valeo,* it is clear that state-enforced limits on campaign contributions and expenditures stifle First Amendment freedoms. *Buckley,* 424 U.S. at 19, 22. Here, because the limit applies to contributions both by and to political committees and funds, the limit affects not only free political speech but also free association, the "tradition of volunteer committees for collective action. . . . [B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost."

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal., 454 U.S. 290, 294 (1981); *accord Buckley*, 424 U.S. at 22, 25-26.

It also is well established that Minnesota's declared purpose in enacting its $100 limit – to avoid corruption or the appearance of corruption in the political process that could result from large amounts of special interest money circulating in the system – is a compelling state interest. *Buckley*, 424 U.S. at 26-27; *see also FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.").

But the fighting issue here is whether a $100 limit on contributions to political committees or funds is narrowly tailored to serve the state's interest, given the burden it imposes on political speech. *Buckley*, 424 U.S. at 25. We hold that it is not.[8] "Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political

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[8] The District Court did not reach the equal protection argument raised in that court. It appears that the legislators who enacted the $100 limit on contributions to political committees and funds, and the governor who signed the limit into law, approved limits on election-year contributions to themselves that were many times higher that the $100 limit on contributions to committees and funds. *See* Minn. Stat. § 10A.27 subd. 1 (Supp. 1993). Because we hold the statute unconstitutional under the First Amendment, we do not address the Fourteenth Amendment issue.

committees from amassing the resources necessary for effective advocacy." *Id.* at 21. And the concern of a political *quid pro quo* for large contributions, which becomes a possibility when the contribution is to an individual candidate, *id.* at 26 ("To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."), is not present when the contribution is given to a political committee or fund that by itself does not have legislative power.

The *Buckley* Court, eighteen years ago, found that a $1000 limit – ten times the limit at issue here – was sufficiently high to pass constitutional muster as narrowly tailored to serve the state's concern for the integrity of the political system. We realize that the *Buckley* limit was never declared to be a constitutional minimum, but it does provide us with some guidance and a frame of reference in evaluating the constitutionality of Minnesota's $100 limit.

Among the undisputed facts relied upon by the District Court is the fact that a $100 contribution in 1976 would have a value of $40.60 in 1994 dollars, or approximately four percent of the $1000 limit approved in *Buckley*. The undisputed facts also show that one-fourth to one-third of MCCL-CSPC's contributions exceeded $100 in the most recent election cycle (presumably the cycle before the one now underway). Based on these facts, we agree with the District Court that a $100 limit on contributions to or by political committees and funds significantly impairs the ability of individuals and political committees and funds to exercise their First Amendment rights. An annual $100 limit on contributions to or by

political funds and committees is too low to allow meaningful participation in protected political speech and association, and thus is not narrowly tailored to serve the state's legitimate interest in protecting the integrity of the political system. Accordingly, we hold that the $100 limit violates the protections afforded by the First Amendment for free political speech and free association.

The judgment of the District Court invalidating section 10A.27 subd. 12 and permanently enjoining its enforcement is affirmed.

IV.

To summarize, we reverse the judgment of the District Court on the facial challenges to section 10A.25 subd. 13 and section 10A.20 subd. 6b of the Minnesota Statutes. Further, we reverse the District Court's judgment on MCCL's as-applied challenge to section 211B.15 subd. 15. We affirm the judgment of the District Court finding section 10A.27 subd. 12 unconstitutional and permanently enjoining its enforcement.

The case is remanded to the District Court for the entry of judgment and the appropriate injunctions in accordance with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

SCOTT DAY, Treasurer of IMPACE-MEA; IMPACE-MEA; and STEVE FRAZIER and RICHARD KIMBLER,

Plaintiffs,

v.

VANNE OWENS HAYES, in her capacity as Chair of the Ethical Practices Board,

Defendant.

and

MINNESOTA CITIZENS CONCERNED FOR LIFE, INC.; JACQUELINE A. SCHWIETZ, Treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates; EILEEN ANGELL, MITCHELL HOYT UNRUH, and LORI ERICKSON,

Plaintiffs,

v.

VANNE OWENS HAYES, as Chair of the State Ethical Practices Board; and HUBERT HUMPHREY III, as Attorney General of the State of Minnesota,

Defendants.

Civil File
No. 3-93-857

MEMORANDUM & ORDER

Civil File
No. 3-93-876

(Filed
May 27, 1994)

This matter is before the Court upon Plaintiffs' Motions for Summary Judgment. The Court has given these motions expedited consideration due to the significant implications of the challenged statutes in the imminent Minnesota primary and general elections. For the following reasons, the Court grants the motions in part and denies them in part and enters partial judgment in favor of the Plaintiffs and partial judgment in favor of the Defendants.

BACKGROUND

Responding to concerns about the financing of political campaigns and the potential for and perception of corruption of the political process through undue influence of large financial contributors, the 1993 Minnesota Legislature significantly amended state laws governing political campaigns and the financing of those campaigns.[1] The new statute, *inter alia*, (i) provides incentives

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[1] The parties disagree about the intent of the Legislature in enacting the new laws. Each side cites legislative history that it contends shows the intent of the Legislature in enacting the law. Plaintiffs rely primarily on statements made in committee hearings by the principal Senate author of the bill, Senator John Marty. Statements by a single senator in a hearing before a committee of a single body of a bicameral legislature are insufficient to demonstrate the collective intent of the entire legislature in subsequently enacting the final version of a bill. It is admittedly difficult to glean the intent of the enacting legislature from the legislative record before the Court. However, based on the entire record, including but not limited to the text of the bill; available legislative history, background information and documents; and the present representations and arguments of the executive branch of Minnesota

for candidates to accept voluntary spending limits including public subsidies to candidates who accept the limits and meet other eligibility criteria; (ii) reduces the amounts of contributions candidates may accept from political committees, political funds, lobbyists and certain individuals; (iii) limits the amount of contributions a political committee or fund may accept from a single donor in a year; (iv) imposes reporting requirements on persons and entities making "independent expenditures" and (v) provides for public subsidies to some candidates who have such independent expenditures made against them. *See* Minn. Stat. Chapter 10A (Supp. 1993) (scattered provisions). The 1993 Legislature also amended Minn. Stat. § 211B.15, a statute that prohibits corporations from making certain types of campaign contributions and expenditures. Plaintiff MCCL, Inc. challenges several provisions of the statute as amended.

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government; the Court concludes that it appears the intent of the enacting legislature was to reduce the potential for corruption and the appearance of corruption in the political processes.

Even if this Court were to somehow determine that the small minority of senators quoted in the Plaintiffs' supporting materials spoke for the entire Legislature, their comments are insufficient to show that the Legislature acted with the intent of suppressing the First Amendment rights of the Plaintiffs. *Cf. Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (in different context (equal protection), Court held that, in order to invalidate as improperly motivated a facially neutral legislative scheme, a Plaintiff must show that "a state legislature selected or affirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group.")

The Plaintiffs brought suit seeking to invalidate several provisions of the above-described laws on December 20, 1993.[2] They challenge the constitutionality of provisions of the law that require reporting of independent expenditures and provide for corresponding subsidies to candidates who meet certain conditions; a provision limiting individual contributions to political funds and committees to $100 per year; and the corporate contribution

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[2] Plaintiffs in Civil File No. 3-93-857 are IMPACE-MEA, the registered political fund of the Minnesota Education Association; Scott Day, the Treasurer of IMPACE-MEA; Steve Frazier, a Minnesota taxpayer and contributor to IMPACE-MEA; and Richard Kimbler, a candidate for Minnesota Secretary of State (where appropriate, the Court occasionally refers to the Plaintiffs in this action collectively, as "IMPACE"). The Defendant in that action is Vanne Owens Hayes, sued in her capacity as Chair of the Minnesota Board of Ethical Practices. Plaintiffs in Civil File No. 3-93-876 are Minnesota Citizens Concerned for Life, Inc. (MCCL); Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates (MCCLCSPC), a registered political fund of MCCL; Jacqueline A. Schwietz, the Treasurer of MCCLCSPC; Eileen Angell, a resident of Minnesota and contributor to MCCLCSPC; Lori Erickson, a Minnesota resident who intends to run for election to the Minnesota Senate and to be bound by the campaign expenditure limits of the challenged statutes; and Mitchell Hoyt Unruh, who intends to run for the Minnesota House and be bound by the same limits (where appropriate, the Court occasionally refers to the Plaintiffs in this action collectively as "MCCL"). The Defendants in that action are Vanne Owens Hayes and Hubert H. Humphrey III, sued in his capacity as Attorney General of the State of Minnesota. Because the actions pose related challenges to the new laws, the Court considers the two actions together. Except were otherwise noted, the Court shall refer to all plaintiffs in both actions collectively as "Plaintiffs" and to both defendants as "Defendants."

and expenditure prohibitions, as applied to Plaintiff MCCL, Inc. Both groups of Plaintiffs seek declaratory judgment that the challenged provisions of Minn. Stat. § 10A violate the First and Fourteenth Amendments to the United States Constitution and seek to permanently enjoin the Defendants from enforcing the challenged statutes. In addition, Plaintiff MCCL, Inc. seeks a declaration that Minn. Stat. § 211B (the "Campaign Act") is unconstitutional and seeks to enjoin Defendants from enforcing the statute against it. The Court denied the Plaintiffs' motions for preliminary injunction on January 5, 1994. Both groups of Plaintiffs now seek summary judgment.

DISCUSSION

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir. 1992). A court may grant summary judgment in favor of a nonmoving party. *See Hvamstad v. Suhler*, 727 F. Supp. 511 (D. Minn. 1989), *aff'd*, 915 F.2d 1218 (8th Cir. 1990); *see also, Celotex*, 477 U.S. at 326 ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence.") The parties are in agreement as to essentially all material facts and have agreed that this matter should be decided in summary fashion based on the existing record. *See Johnson v. Bismarck Public School Dist.*, 949 F.2d 1000, 1004-05 (8th Cir. 1991) (when parties agree that issues should be decided in summary fashion,

judgment in favor of either moving party or non-moving party is permissible). Hence, the Court's task here is to determine questions of law and enter judgment in this matter.

I. Justiciability[3]

At the time of the Court's denial of Plaintiffs' motions for preliminary injunction, it was not clear that the Plaintiffs had alleged sufficient interests and facts to confer standing and to make the case ripe for this Court's review. In the interim, Plaintiffs have remedied those arguable deficiencies by adding several individual Plaintiffs and by alleging facts sufficient to show that candidates they oppose will likely be eligible for public subsidy in the coming election cycle. However, it bears repeating that the mere making and reporting of an independent expenditure by a person or group opposed to a candidate is not sufficient to qualify that candidate for a public subsidy. In order to qualify for a public subsidy based on an independent expenditure made against her, a candidate must have previously accepted voluntary spending limits, must meet public subsidy eligibility

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[3] The Defendants originally contended Plaintiff MCCL, Inc. lacked standing to bring its challenge to Minn. Stat. § 211B because its articles of incorporation prohibited it from participating in political campaigns. However, the Defendants later determined that MCCL, Inc. (MCCL) had repealed that provision of its articles of incorporation. Accordingly, the Defendants withdrew their argument that MCCL lacked standing to challenged Section 211B. The Court agrees with the Defendants' assessment and will thus consider the merits of MCCL's Section 211B challenge. *See infra* at IV.

requirements, and must have raised twice the minimum match otherwise required. *See* Minn. Stat. § 10A.25 subd. 13.[4]

Plaintiff Steve Frazier contends he is entitled to challenge this law both as a taxpayer and as an ordinary citizen. Frazier argues that Minn. Stat. § 10A.25 violates his First Amendment rights by effectively forcing him to subsidize a candidate he opposes through government expenditure of funds it obtains through the state income tax. Because Frazier is a Minnesota taxpayer, he contributes to the collective pool of state funds whence the State would draw funds to pay subsidies to eligible candidates under Chapter 10A.

Generally, suits based on taxpayer status and ideological injury arising from that status are not cognizable in federal court. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613 (1989). Taxpayers are generally not allowed to bring suits to challenge laws of general applicability based on their taxpayer status because their injury is not separate and "distinct from that suffered by other taxpayers . . . " *Id.* The Supreme Court carved an exception to the prohibition on such "taxpayer standing" in *Flast v. Cohen*, 392 U.S. 83 (1968). However, subsequent cases have effectively delineated the very narrow scope of that exception – the Supreme Court has found taxpayer standing *only*

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[4] Similarly, the increased expenditure ceiling provided by Minn. Stat. § 10A.25 subd. 13(a) applies to only those candidates who have voluntarily accepted the expenditure limits in the first instance *and* whose major party opponent also agrees to be bound by the voluntary limits. *See* Minn. Stat. § 10A.25 subd. 10 (Supp. 1993).

when the taxpayer challenges government spending alleged to violate the Establishment Clause of the First Amendment. It has rejected taxpayer standing in every other case originally brought in federal court. *See, e.g., United States v. Richardson,* 418 U.S. 166 (1974); *Valley Forge Christian College v. Americans United for Sep. of Church & State,* 454 U.S. 464 (1982); *see also Bowen v. Kendrick,* 487 U.S. 589 (1988); *Marsh v. Chambers,* 463 U.S. 783 (1983) (establishment clause challenges); *cf. ASARCO,* 490 U.S. at 616-24 (1989) (allowing standing for Supreme Court review of action brought in state court, though standing would not exist if action originally brought in federal court).

Frazier does not allege an injury arising from the challenged statutes that is distinguishable from the generalized injury suffered by innumerable taxpayers who disagree with government expenditures of tax-generated funds. As the Supreme Court noted more than seventy years ago, suits based on a taxpayer's generalized grievance are not justiciable in federal court because the taxpayer's

> interest in the moneys of the Treasury – partly realized from taxation and partly from other sources – is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention]

Frothingham v. Mellon, 262 U.S. 447, 487 (1923). Further, Frazier does not allege that the challenged statutes violate the Establishment Clause of the First Amendment

and thus does not fit within the narrow exception to the general prohibition against taxpayer standing. Accordingly, the Court finds Frazier lacks taxpayer standing.

Frazier more likely has general citizen standing to challenge Chapter 10A, because he is a member of and contributor to IMPACE-MEA. However, his challenge based on that status is indistinguishable from the challenge brought by other individual parties to these suits and the Court need not separately discuss that aspect of Frazier's challenge.

II. Independent Expenditures Provisions[5]

Plaintiffs challenge the "independent expenditures" provisions of Chapter 10A, which provide, in pertinent part:

> **Subd. 6b. Independent expenditures; notice.**
>
> (a) Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of $100, other than an expenditure by an association targeted to inform solely its own dues-

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[5] The IMPACE Plaintiffs also contend that the challenged provisions of Chapter 10A violate Art. 1, Sec. 3 of the Minnesota Constitution. However, Plaintiffs do not argue that the protections afforded by the Minnesota Constitution are different from those provided by the First Amendment to the United States Constitution and offer no separate analysis of the application of the Minnesota Constitution to the statutes at issue. The Court will assume for purposes of this analysis that the reach and protections of Minn. Const. Art. 1, Sec. 3 are co-extensive with those of U.S. Const. Am. 1.

paying members of the association's position on a candidate, the individual, political committee, or political fund shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy of the affidavit on each candidate in the affected race and on the treasurer of the candidate's principal campaign committee. The affidavit must contain the information with respect to the expenditure that is required to be reported under subdivision 3, paragraph (g); except that if an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.

(b) An individual or the treasurer of a political committee or political fund who fails to give notice as required by this subdivision, or who files a false affidavit of notice, is guilty of a gross misdemeanor and is subject to a civil fine of up to four times the amount of the independent expenditure stated in the notice or of which notice was required, whichever is greater.

Minn. Stat. § 10A.20 subd. 6b (Supp. 1993).

Subd. 13. Independent expenditures; limits increased.

(a) The expenditure limits in this section are increased by the sum of independent expenditures made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents, other than expenditures by an association targeted to inform solely its own dues-paying members of the association's position on a candidate.

(b) Within 48 hours after receipt of an expenditure report or notice required by section 10A.20, subdivision 3, 6, or 6b, the board shall notify each candidate in the race of the increase in the expenditure limit for the candidates against whom the independent expenditures have been made.

(c) Within three days after providing this notice, the board shall pay each candidate against whom the independent expenditures have been made, if the candidate is eligible to receive a public subsidy and has raised twice the minimum match required, an additional public subsidy equal to one-half the independent expenditures. The amount needed to pay the additional public subsidy under this subdivision is appropriated from the general fund to the board.

Minn. Stat. § 10A.25 subd. 13 (Supp. 1993).

Subd. 10b. Independent expenditure. "Independent expenditure" means an expenditure expressly advocating the election or defeat of a clearly identified candidate, which expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate. An expenditure by a political party or political party unit, as defined in section 10A.275, subdivision 3, in a race where the political party has a candidate on the ballot is not an independent expenditure.

Minn. Stat. § 10A.01 Subd. 10b (Supp. 1993).

A. Restriction or Burden on Free Speech

The Plaintiffs contend that the independent expenditures statute is unconstitutional because it burdens their exercise of free speech rights. In support of this contention, Plaintiffs argue that, through the statute's subsidy and increased expenditure provisions, the Government will force Plaintiffs to subsidize the speech of a candidate they oppose as the price of independent expenditures in favor of a candidate they support. *See* Minn. Stat. § 10A.25 subd. 13 (Supp. 1993). Stated differently, Plaintiffs contend they are faced with a choice "between not speaking or subsidizing the campaign coffers of the candidate being opposed" and argue that difficult choice impermissibly burdens their exercise of free speech rights.

Plaintiffs' argument that if they decide to make independent expenditures they will be forced to subsidize the speech of their opponents misperceives the nature of the subsidy provided by the statute. Unlike the governmental regulations struck down in *Miami Herald* and *Pacific Gas & Electric*, which forced private entities to fund the speech of their opponents directly through expenditure of their own private funds, the present statute provides for a *public* subsidy to opponents of candidates supported by the Plaintiffs. *See Pacific Gas & Elec. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The Supreme Court made it clear in *Pacific Gas* that content-neutral, public subsidies of political speech are permissible. *Pacific Gas*, 475 U.S. at 14-15. The flaw in the government regulation of speech in *Pacific Gas* was that it

> identifie[d] a favored speaker based on the identity of the interests that [the speaker] may represent . . . and force[d] the speaker's opponent – not the taxpaying public – to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of the disfavored speaker.

Id. at 15 (citations omitted). The present statute is content neutral. Any subsidy or increase in expenditure limits is triggered solely by the event of an independent expenditure, regardless of the interest of the speaker or the content of the speaker's message. Further, the entity making the independent expenditure is not forced to expend its own private resources to facilitate the expression of an opposing viewpoint.

Contrary to the arguments of the Plaintiffs, the law imposes no restrictions on their ability to make independent expenditures. The independent expenditures law imposes no limit on the amount a person or entity may spend and does not otherwise constrain Plaintiffs' exercise of protected speech rights. It merely provides that, under some conditions, an opposing candidate may be entitled to spend additional amounts on his own campaign message and that he may also be entitled to an additional public subsidy. Plaintiffs are free to make as many independent expenditures as they desire without restraint, censure or penalty by the Government. The independent expenditures law imposes no significant restriction on the Plaintiffs' speech.[6] Instead, the law

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[6] Plaintiffs do not argue that the independent expenditure reporting requirements would impose a heavy or costly administrative burden that would chill their exercise of their First

merely provides that, in certain limited circumstances, independent expenditures may trigger an opportunity for an opponent to respond using public funds, additional private funds or both.

Plaintiffs' contention that the public subsidy provision unfairly advantages the opposing candidate or constitutes an improper use of public funds is equally unavailing. The government has no obligation to subsidize all speech equally. *See Regan v. Taxation with Representation of Washington,* 461 U.S. 540, 546-47. If the subsidy is content-neutral, government's decision to subsidize only certain speech does not abridge the First Amendment rights of those who do not receive the subsidy. *Regan,* 461 U.S. at 546 (1983); *see Rust v. Sullivan,* 111 S. Ct. 1759 (1991); *Planned Parenthood v. Agency for Int'l Dev.,* 915 F.2d 59 (2d Cir. 1990), *cert. denied,* 111 S. Ct. 2257 (1991). In the present case, in furtherance of what it believes is the public interest, the Government has chosen to subsidize the speech of candidates against whom independent expenditures are made while refusing to subsidize the speech of persons and entities that make independent expenditures. Because the subsidies are content-neutral and not "aimed at the suppression of dangerous ideas," they do not run afoul of the guarantees of the First Amendment. *Regan,* 461 U.S. at 550.

The independent reporting and subsidy provisions of the statute may make the Plaintiffs' strategic decisions regarding independent expenditures and weighing their

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Amendment rights. *Cf. Austin v. Michigan Chamber of Commerce,* 110 S. Ct. 1391, 1396-97 (1990).

possible consequences more difficult. However, the First Amendment does not guarantee the Plaintiffs freedom from difficult choices. A government regulation which forces a civic organization to make a difficult choice with respect to the exercise of constitutional rights does not, without more, violate the organization's First Amendment rights. *See Brookins v. O'Bannon*, 699 F.2d 648 (3d Cir. 1983). Here, though the independent expenditures statute may in some circumstances create a dilemma for the Plaintiffs, they have not shown that such a dilemma would impermissibly restrict their First Amendment rights.

Because the independent expenditure provisions would facilitate more speech in some circumstances, they may actually advance core values underlying the First Amendment. A primary purpose of the First Amendment is "to secure the widest possible dissemination of information from diverse and antagonistic sources." *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *see Red Lion Broadcasting Co. v. Fed. Communications Comm'n*, 395 U.S. 367 (1969). To the extent the statute provides for increased debate about issues of public concern raised by an independent expenditure, it promotes the free and open debate the First Amendment seeks to foster and protect. *See id.; cf. Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (public financing of campaigns "furthers, not abridges, pertinent First Amendment values"). The Court concludes that the independent expenditures provisions of the statute do not constitute an unconstitutional burden on free speech.

B. Vagueness and Overbreadth Challenges

1. Vagueness

Plaintiffs also contend that the independent expenditures notice provisions should be declared void for vagueness. Due process requires that a law whose violation is punishable by criminal penalty must state clearly what conduct it requires or prohibits. *Kolender v. Lawson*, 461 U.S. 352 (1983). A penal statute that fails to define the criminal offense clearly in terms understandable by ordinary people, is "void-for-vagueness" because it violates constitutional due process requirements. *Id.* at 357. The vagueness doctrine and underlying due process concerns are implicated here because the independent expenditures notice statute provides that failure to comply with the requirements of the statute is punishable as a gross misdemeanor, *see* Minn. Stat. § 10A.20 subd. 6b(b), and because the statute regulates expressive activity.

The independent expenditures notice provision essentially provides the mechanism through which the Ethical Practices Board (Board) would determine when a candidate – who meets all the other necessary preconditions – is eligible for additional public or private funding on the basis of an independent expenditure made on behalf of his or her opponent. For purposes of the vagueness dispute, the notice obligation is set forth in the following section:

> Subd. 6b. Independent expenditures; notice. (a) Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of

> $100 . . . the [obligor] shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy of the affidavit on each candidate in the affected race and on the treasurer of the candidate's principal campaign committee . . . [I]f an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.
>
> (b) An individual or the treasurer of a political committee or political fund who fails to give notice as required by this subdivision, or who files a false affidavit of notice, is guilty of a gross misdemeanor and is subject to a civil fine of up to four times the amount of the independent expenditure stated in the notice or of which notice was required, whichever is greater.

Minn. Stat. § 10A.20 subd. 6(b) (Supp. 1993).

Plaintiffs assert that the phrase "becomes obligated by written or oral agreement to make an independent expenditure" is so indefinite that they are unable to determine their reporting obligations under the statute. They argue that the nature of independent political expenditures and the imprecision of the term "obligated" make it impossible to determine when they are required to report the independent expenditures to the Board. They conclude that they are subject to risk of penal sanction without adequate notice of what is necessary to conform their conduct to the requirements of the statute.

The Plaintiffs' vagueness challenge to the independent expenditures reporting procedure presents a somewhat closer question than their challenges to the more

substantive provisions of the law. *See supra.* II.A. The language of the independent expenditure reporting requirements might have been written more clearly or with greater precision. However, because the Legislature is necessarily confined to words to express the requirements of the law, the Court cannot expect the parameters of the law to be delineated with mathematical precision or certainty. *See Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989); *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972). Whether this Court or the Plaintiffs might have written the statute differently is not the standard that guides the Court's review. The proper inquiry is whether the language of statute as enacted is sufficiently definite to allow ordinary citizens to understand what is required of them and to discourage arbitrary and discriminatory enforcement. *See Kolender,* 461 U.S. at 357; *Grayned,* 408 U.S. 104. The Court concludes that, under the due process analysis and standards articulated in *Kolender* and its antecedents, Plaintiffs' vagueness challenge must fail.

The existence of a legal obligation is readily determined by common experience and the application of well-established principles of contract law and related equitable principles.[7] Whether an obligation exists between a person or entity making an independent

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[7] It is reasonable to assume the statute refers to a legal obligation, because the State is without authority to determine the existence of a moral obligation or to attempt to enforce any variety of obligation not grounded in statutory or common law. The Court also notes that none of the Plaintiffs suggests [sic] that the alternative event triggering a reporting obligation, the actual making of an independent expenditure, should be held void for vagueness.

expenditure and the provider of a good or service in exchange for that expenditure does not require speculation or more sophistication or experience than that of an ordinary consumer – either a person is legally obligated to make an expenditure or she is not.[8]

Political funds and committees like MCCLCSPC and IMPACE-MEA have a higher degree of sophistication and experience in matters of political expenditures and obligations than the ordinary person. In light of that experience, their contention that they would be unable to determine whether or when they become obligated to make an expenditure lacks credibility. Certainly the public media and vendors of other goods and services related to political communications would be unwilling to provide such services if they believed that purchasers of

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[8] The individual Plaintiffs do not allege their right to make independent expenditures directly in their capacity as individuals is infringed by the reporting requirement or that the reporting requirement as applied to individuals should be held void for vagueness. The individual Plaintiffs have not alleged sufficient facts to confer standing to bring such a challenge. However, even if such a challenge were appropriately presented in this action, the Court doubts the individual Plaintiffs could prevail. In the course of daily life, people enter various transactions and oral and written agreements creating binding obligations. The conduct of commerce depends on ordinary consumers and merchants understanding the nature of obligations – including obligations to make expenditures – and how and when those obligations arise. Although possibly somewhat less sophisticated than a political fund or organization, a person of ordinary experience understands when she is legally "obligated." Therefore, the language of the statute is likely not impermissibly vague on its face, even with respect to its application to individuals.

those goods and services would seriously contend they were unable to determine if they had incurred an obligation to pay for those services. The creation of a binding obligation provides a clear line of demarcation between negotiations and discussions regarding independent expenditures, which entities have no duty to report, and the conclusive decision to make an independent expenditure, which they must report. If, for example, a political committee contemplates an independent expenditure and discusses the *possibility* of making such an expenditure with a vendor, but enters no binding agreement, the committee is not *obligated* to make such an expenditure and, under the terms of the statute, the reporting requirement is not triggered.

Several of the Plaintiffs' vagueness arguments fail to distinguish between the *timing* of the creation of an obligation and the objective existence of an obligation. The Court understands that the nature of political campaigns in general, and independent expenditures in particular, makes the timing of decisions regarding the creation of obligations to make such expenditures unpredictable and uncertain. In some cases, the creation of an obligation to make an expenditure and the actual expenditure may occur nearly simultaneously. Further, for a variety of reasons, a person or entity may plan to make an independent expenditure and later decide not to make that expenditure. However, the timing of the ultimate decision regarding an independent expenditure does not determine whether an entity is obligated to make such an expenditure. Similarly, if an entity enters a binding obligation to make an independent expenditure and later for its own reasons decides not to publish (in the broad

sense) the good or service procured by the expenditure, the obligation still exists.[9]

The existence of an obligation is not vague or indeterminate. People of ordinary experience and intelligence understand when they have entered an obligation; a law imposing reporting requirements on those who enter independent expenditure obligations does not require them to guess at its meaning or expose them to the risk of penalty without fair warning. *See Kolender*, 461 U.S. 352 (1983); *Grayned*, 408 U.S. 104, 110 (1972); *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 740 (1970).

Further, if Plaintiffs or similarly situated entities or individuals actually were unable to determine whether particular events or circumstances triggered a reporting obligation, they could request an advisory opinion from the Board to resolve their dilemma. Minn. Stat. § 10A.02 subd. 12 provides a mechanism whereby persons subject to the requirements of the independent expenditures statute may seek an advisory opinion to guide their conduct, "based upon real or hypothetical situations."[10] The

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[9] For example, if a political committee contracts with a public relations firm to pay to have campaign flyers promoting a specific candidate printed and distributed and, after the flyers are printed, the committee decides not to distribute those flyers, the binding obligation created by the contract remains. Presumably, the obligation would trigger the statute's reporting requirements even though ultimately it did not result in public expressive activity on behalf of the candidate.

[10] The advisory opinion section provides, in pertinent part:

> The [ethical practices] board may issue and publish advisory opinions on the requirements of this chapter based upon real or hypothetical situations. An

United States Supreme Court suggested that such an advisory opinion mechanism could alleviate vagueness problems, if the mechanism were available to all those who are subject to the requirements of the campaign finance law. *Buckley v. Valeo*, 424 U.S. 1, 40 n.47 (1986). After Congress amended the statute at issue in *Buckley* to make the advisory opinion procedure available to all "persons," the D.C. Circuit opined that mechanism would substantially reduce whatever "chill" of free speech rights exercise might be induced by arguable vagueness of the language of the law. *Martin Tractor v. FEC*, 627 F.2d 375, 384-86 (D.C. Cir. 1980); *see also, United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973). Finally, this Court, reviewing the same advisory opinion mechanism's application to a different provision of Chapter 10A, held that mechanism could serve to alleviate vagueness problems. *See Bang v. Chase*, 442 F. Supp. 758, 769-70, including n.33 (D. Minn. 1977), *aff'd*, 436 U.S. 941 (1978). After reviewing three advisory opinions issued by the Board pursuant to Section 10A.02 subd. 12, the Court concluded that those opinions eliminated the arguable vagueness of the challenged statute. *Id.*

> application for an advisory opinion may be made only by an individual or association who wishes to use the opinion to guide the individual's or the association's own conduct. The board shall issue written opinions on all such questions submitted to it within 30 days after receipt of written application, unless a majority of the board agrees to extend the time limit. . . .

Minn. Stat. § 10A.02 subd. 12 (Supp. 1993).

The challenged statutes are not unconstitutionally vague. The substantive provisions of the statute alone are sufficiently clear and definite to satisfy the requirements of due process and the First Amendment. The ready availability of authoritative advisory opinions serves to eliminate any residual concern of confusion Plaintiffs may have regarding the application of the statute and their obligations thereunder.

2. Overbreadth

In a related objection, Plaintiffs contend that the reporting requirement may compel them to report obligations to make expenditures which are not ultimately translated into published political speech in favor of a candidate. The Court interprets this complaint to state a modified "overbreadth" or "overinclusiveness" argument that also incorporates other objections previously discussed. The Plaintiffs essentially argue that due to their failure to translate obligations to speech, their political opponents may be aided by an additional government subsidy when the candidate Plaintiffs support has received no benefit from the expenditure or obligation. This, they apparently conclude, constitutes an overbroad regulation of their political speech because it subsidizes their opponent and effectively penalizes them for speech they did not make. The Supreme Court has emphasized the limited application of the overbreadth doctrine, stating "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in

relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The Plaintiffs' hybrid argument fails for two reasons. Initially, the Court previously concluded that the independent expenditures provisions do not burden the Plaintiffs' exercise of rights guaranteed by the First Amendment. The reporting requirement does not restrict Plaintiffs' freedom to make independent expenditures – they remain free to make or not make whatever expenditures they wish. Plaintiffs offer no argument to suggest that the law would burden the exercise of First Amendment rights of others not before the Court. Because neither the Plaintiffs' nor any other citizen's First Amendment rights are burdened by the reporting requirement, overbreadth analysis is not appropriate. Second, as previously discussed, the Government has no obligation to subsidize various types of expression equally, so long as the subsidy scheme is content-neutral. *See Regan v. Taxation with Representation*, 461 U.S. 540 (1988); *Pacific Gas & Elec. v. Public Utilities Comm'n of California*, 475 U.S. 1, 15-16 (1986). The fact that the triggering event for government subsidy of a candidate's campaign expression may or may not correlate with an actual expenditure in support of that candidate's opponent is not relevant to the principles expressed in *Regan* and its progeny. Plaintiffs have not shown that the independent expenditures provisions of the statute are overbroad.

III. $100 Contribution Limit

Plaintiffs MCCLCSPC and its member/officers (collectively MCCLCSPC) also contend that the $100 contribution limit imposed by Minn. Stat. §10A.27 subd. 12 impermissibly infringes their right of free association guaranteed by the First Amendment and violates the Fourteenth Amendment guarantee of equal protection of the laws. The law provides:

> **Subd. 12. Contributions to other political committees or funds.** The treasurer of a political committee or political fund, other than a candidate's principal campaign committee or a political party unit as defined in section 10A.275, shall not permit the political committee or political fund to accept aggregate contributions from an individual, political committee, or political fund in an amount more than $100 a year.

Minn. Stat § 10A.27 subd. 12.

The Court agrees that the contribution limit restricts freedom of association. However, under the analysis set forth in *Buckley*, even a significant government interference with rights of political association may be sustained if it is justified by an important government interest and if it employs means narrowly drawn to avoid needless infringement of associational freedoms. *Buckley*, 424 U.S. at 25-26 (1976). The Supreme Court extended the rule announced in *Buckley* to multicandidate political committees like Plaintiff MCCLCSPC in *California Med. Ass'n v. Fed. Elections Comm'n*, 453 U.S. 182 (1981). The government regulations approved in *Buckley* and *California Med. Ass'n* were political contribution ceilings similar in

design and intent to the limit imposed by Minn. Stat. § 10A.27 subd. 12.

As in *Buckley*, a primary concern of the Minnesota Legislature in enacting this statute was prevention of the appearance and reality of corruption of the political process through the exercise of undue and improper influence by persons and entities making large financial contributions. The legislative history suggests that the Legislature also intended the contribution limit to restore and maintain citizens' confidence in their government and elected officials. "Preserving the integrity of the electoral process [and] preventing corruption . . . are interests of the highest importance. Preservation of the individual citizen's confidence in government is equally important." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (citations omitted). Based on the entire record, *see* n. 1, *supra*, the Court concludes that the Defendants have shown that the contribution limit is supported by compelling government interests.

The Government must also show the contribution limit is narrowly tailored to serve those compelling interests and to avoid unnecessary infringement of associational freedoms. *Buckley*, 424 U.S. at 25-26. In its prior order denying Plaintiff's request for injunctive relief, the court determined that the relatively low limit on monetary contributions did not offend the rights of association implicit in the First Amendment. *See* Memorandum and Order dated January 5, 1994; *see also NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460 (1958). Further review of the record, economic data and relevant case law compels the Court to conclude the limit is too low to pass constitutional muster.

The *Buckley* Court held that, as long as a reviewing court is satisfied that some limit on contributions is necessary, it need not determine the precise amount which will effectuate the government's important interest. *Buckley*, 424 U.S. at 30. The Court further noted that differences in degree of regulation may be significant if they amount to "difference in kind." *Id.* (citations omitted). With respect to contribution limits, the "kind" of regulation at issue in *Buckley* and virtually all subsequent reported federal cases is a limit which discourages the potential for, "actuality and appearance of corruption [of the political process] resulting from *large* individual financial contributions" *Buckley*, 424 U.S. at 26 (emphasis added). Here, the Court finds that the $100 limit is so low that it renders the limit "different in kind" from those previously upheld by other federal courts and concludes that the limit is not narrowly tailored to serve the government's compelling interest.

The Court has reviewed several post-*Buckley* cases in which courts upheld limits on contributions to multicandidate political committees. None of those cases upheld a limit below $1000. *See California Med. Ass'n v. FEC*, 453 U.S. 182 (1981) (upholding $5000 annual limit on contributions to political committees); *Mintz v. Barthelemy*, 722 F.Supp. 273, 281-82 (E.D. La. 1989), *aff'd*, 891 F.2d 520 (5th Cir. 1989) (upholding $5000 contribution limit for local mayoral election); *Mott v. FEC*, 494 F. Supp. 131 (D.D.C. 1980) ($5000 contribution limit upheld); *Matter of Vanderlinde*, 366 S.E.2d 631, 636 (W. Va. 1988) (upholding $1000 contribution limit); *Florida Police Benevolent Ass'n v. Florida Election Comm'n*, 430 So.2d 483 (Fla. Dist. Ct. App.) (1983) ($1000 contribution limit upheld); *cf.*

Gard v. Wisconsin State Elections Bd., 456 N.W. 2d 809 (Wis. 1990) (upheld $11,000 cap on aggregate contributions candidate could accept from political committees), *cert. denied*, 111 S.Ct. 512 (1990). The $100 contribution limit imposed by the Minnesota statute is ten percent, or one-tenth, of the lowest limit upheld in the cases this Court has reviewed.

More than eighteen years ago, the Supreme Court upheld a $1000 limit on contributions to campaign committees and individuals. The *Buckley* Court noted that, in the preceding two-year election cycle, only 5.1% of all contributions to candidates for the United States Congress exceeded $1000. *Buckley*, 424 U.S. at 21, n.23. The Court also reviewed the individual contributions exceeding of $1000 received by the various appellants, finding that several received no such contributions. *Id.* at 34, n.40 In no instance did such contributions constitute more than .25 percent of the total number of contributions. *See id.* It appears that very few donors contributed more than $1000 to candidates and committees in 1976; those making donations exceeding $1000 were plainly "large" contributors, implicating the government's interest in combatting [sic] political corruption. *See Buckley*, 424 U.S. at 26. Thus, the Court could readily find that a $1000 limit narrowly focused on truly large contributions, which posed the greatest threat of corruption.

Here, the record shows that in the last election cycle at least one-fourth and possibly as much as one-third of the total monetary value of MCCLCSPC's contributions came from contributions exceeding $100. (*See* First & Second Schwietz Affid.) It appears that the $100 limit would significantly reduce the ability of MCCLCSPC –

and thereby the collective ability of its individual contributors – to provide financial support to candidates. *Cf. Buckley,* 424 U.S. at 29 ($1000 contribution limit allowed individuals to financially support candidates and committees "to a limited but nonetheless substantial extent").

More significantly, inflation has substantially eroded the relative value of the dollar since the 1976 *Buckley* decision. As measured by the Consumer Price Index, one dollar in 1992 was equivalent to approximately $.406 in 1976. This means that, for purposes of comparison, today's $100 contribution limit translates to approximately $40.60 at the same time of *Buckley.*[11] Thus, in real terms, the contribution limit prescribed by Minn. Stat. § 10.27 subd. 12 is approximately 4 percent or 1/25 of the limit approved in *Buckley.* In the Court's view, the difference in these two limits is so substantial that the Minnesota statute constitutes a regulatory "difference in kind."

A $100 limit on contributions regulates too broadly by limiting the rights of association of relatively small contributors along with those of large contributors. The Supreme Court has held that the Constitution allows

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[11] The most recent year for which annual Consumer Price Index (CPI) data is available is 1992. The Court made its calculations using the "All items" CPI for 1976 and 1992. *See* 1993 Statistical Abstract of the United States, table no. 756. The 1976 CPI was 56.9 and the same datum for 1992 was 140.3. Thus, the appropriate "deflator" to convert 1992 dollars to 1976 dollars is 56.9/140.3 = .406. Multiplying .406 times $100 yields the value of the present $100 contribution limit in 1976 dollars, $40.60. Because there has been additional inflation between December 31, 1992 and the present, the actual value of 100 mid-1994 dollars in 1976 terms would be lower than $40.60.

limitation of contributions only to the extent such limits are necessary to reduce actual and apparent corruption engendered by *large* individual financial contributions. *Buckley*, 424 U.S. 1, 25-29. The Court concludes that the $100 limit is not narrowly drawn to serve those ends. The limit is so low that it unnecessarily limits the rights of citizens to engage in legitimate expressive political activity and abridges their rights of association guaranteed by the First Amendment. *See id.* Therefore, the Defendants and the State of Minnesota may not enforce Minn. Stat. §10.27 subd. 12. Because the Court has held Subdivision 12 invalid under the First Amendment, it need not assess the Plaintiffs' equal protection challenge to the same statute.[12]

Having held Subdivision 12 unconstitutional, the Court must determine whether that holding requires it to invalidate the entire statute. The Minnesota statute governing this question provides:

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[12] Assuming, *arguendo*, that political committees and candidates are similarly situated for equal protection purposes, the Court would apply a "strict scrutiny" test to determine whether the differential contribution limits applied to political committees and individual candidates are allowed by the Equal Protection Clause of the Fourteenth Amendment. Because the Court previously determined the statute implicates Plaintiffs' fundamental right of association under the First Amendment, heightened scrutiny of the differential classification would be appropriate. *See New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13-16 (1988); *Lyng v. Automobile Workers*, 485 U.S. 360, 365-66 (1988). While the Defendants have adduced ample evidence to show the statutory classification has a rational basis, it is doubtful that the law could withstand strict scrutiny.

> Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Minn. Stat. §645.20. The foregoing statute "creates a presumption of severability which is rebutted only if the court concludes the Minnesota legislature would not have enacted the valid portions without the void ones" *Bang v. Chase*, 442 F. Supp. 758, 770 (1977). As a general rule, an unconstitutional statutory amendment is ineffective and leaves the statute as it was prior to the amendment. *Bongard v. Bongard*, 342 N.W.2d 156, 159 (Minn. App. 1983).

The other provisions of Chapter 10A (the "Ethics in Government Act") do not depend on Section 10A.27 subd. 12. All are separate, independent and enforceable without reference to Subdivision 12. In fact, most of the provisions of Chapter 10A were enacted prior to the 1993 amendments that created Subdivision 12. The Court finds no evidence to suggest that the void provision is an indispensable part of the statutory scheme or that the Legislature would not have enacted Chapter 10A or the

remaining 1993 amendments without the invalid contribution limit. Therefore, the Court will invalidate only the single provision it finds unconstitutional. Minn. Stat. §10A.27. subd. 12.

IV. Minn. Stat. § 211B's Corporate Contribution Prohibition

Plaintiff MCCL, Inc. (MCCL) challenges Minn. Stat. § 211B's limits on political contributions by corporations. MCCL is a nonprofit corporation which engages in limited business activities and accepts contributions from for-profit business corporations. MCCL has made expenditures in the past for the purpose of advocacy on behalf of candidates for public office and desires to continue to do so. It has not made independent expenditures to promote or defeat candidates in the past but desires to make such expenditures in the future. The challenged statute, which would prohibit MCCL as presently organized from making both direct contributions and independent expenditures, provides in relevant part:

> **211B.15. Corporate political contributions**
>
> **Subdivision 1. Definitions.** For purposes of this section, "corporation" means:
>
> (1) a corporation organized for profit that does business in this state; [or]
>
> (2) a nonprofit corporation that carries out activities in this state
>
> * * *
>
> **Subd. 2. Prohibited contributions.** A corporation may not make a contribution or offer or

agree to make a contribution, directly or indirectly, of any money, property, free service of its officers, employees, or members, or thing of monetary value to a major political party, organization, committee, or individual to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office. For the purpose of this subdivision, "contribution" includes an expenditure to promote or defeat the election or nomination of a candidate to a political office that is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of, a candidate or committee established to support or oppose a candidate.

Subd. 3. Independent expenditures. A corporation may not make an independent expenditure or offer or agree to make an independent expenditure to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office. For the purpose of this subdivision, "independent expenditure" means an expenditure that is not made with the authorization or expressed or implied consent of, or in cooperation or concert with, or at the request or suggestion of, a candidate or committee established to support or oppose a candidate.

* * *

Subd 15. Nonprofit corporation exemption. The prohibitions in this section do not apply to a nonprofit corporation that:

(1) cannot engage in business activities;

(2) has no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and

(3) was not established by a business corporation or a labor union and has a policy not to accept significant contributions from those entities.

Minn. Stat. § 211B.15 (Supp. 1994).

A. Scope of Regulation

MCCL initially contends that the language of Subdivision 3 is too broad to fit within the allowable scope of government regulation of independent expenditures delineated in *Buckley* and its progeny. The Court understands the Plaintiff to assert a vagueness challenge. Ironically, the Plaintiff's argument here is notable more for its brevity than for its clarity. However, the standards for analyzing a "void-for-vagueness" challenge set forth *supra* at II.B apply equally to MCCL's challenge to Section 211B.15. In *Buckley,* the Supreme Court found statutory limits on independent expenditures "relative to a clearly identified candidate" unconstitutionally vague, but upheld the limit after construing the quoted language of the statute to apply to expenditures "for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley,* 424 U.S. at 44. In the present case, the statute prohibits corporations from making independent expenditures "to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political

office." Minn. Stat. § 211B.15 subd. 3. Unlike the language in *Buckley*, the foregoing requires no limiting construction. A person of ordinary intelligence could readily understand that what is prohibited is any expenditure for communication clearly directed at a specific candidate with the intent of encouraging or discouraging the candidate's election or appointment. In the words of the *Buckley* Court, Subdivision 3 prohibits "communications that in express terms advocate the election or defeat" of a candidate for elective or appointed office. *See id.*

Contrary to MCCL's contention, the fact that the limits of Chapter 211B extend to expenditures to promote or defeat the candidacy of an individual for *appointment* to public office does not violate its First Amendment rights. Although the issue was apparently not presented in *Buckley*, this Court can discern no difference between the importance of the government interest in avoiding corruption in the electoral process and the same interest in the appointment process. For example, corporate expenditures to encourage the appointment of a specific individual to an executive branch position present a similar risk of *quid pro quo* unfair favorable treatment of the supporting corporation by the appointed official. Obviously, such a transaction is equally corrupting and carries equal potential for erosion of citizens' confidence in their government regardless of whether the complicit official is elected or appointed.

MCCL relies on *Bellotti* to support its contention that the State may not regulate corporate expenditures favoring or opposing a candidate for appointment. *Bellotti* stands for the proposition that a state may not prohibit a corporation from spending money to influence public

debate or the outcome of a referendum *on an issue. First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765. *Bellotti* found "[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *Bellotti,* 435 U.S. at 790 (internal citations omitted). *Bellotti* teaches that expenditures on behalf of a candidate, who may be susceptible to improper influence, differ in essential respects from expenditures directed at an inanimate issue of public concern. Those differences do not depend on whether a candidate seeks elected or appointed public office.

B. Non-Profit Corporation Exception

MCCL's principal objection to the corporate political contributions statute is that the First Amendment precludes the State from proscribing independent expenditures by non-profit corporations like MCCL. Due to the "unique state-conferred corporate structure that facilitates the amassing of large corporate treasuries . . . [c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures." *Austin v. Michigan Chamber of Commerce,* 110 S. Ct. 1391, 1398 (1990). The unique legal and economic attributes of corporations thus creates the potential for corruption or the appearance of corruption through corporate political expenditures. *Id.* at 1397-98. Avoidance of such corruption or its appearance is a compelling government interest, justifying some regulation of corporations' political expenditures. *Id.; FEC v. Mass. Citizens for Life,* 479 U.S. 238 (1986) (hereinafter *MCFL*); *cf. Bellotti,*

435 U.S. 765 (1978) (state may not restrict corporate spending to influence public debate or referenda on *issues* because no risk of corruption).[13]

It is well established that states may impose the type of restrictions contained in Minn. Stat. § 211B.15 on *for-profit* corporations. *See MCFL*, 479 U.S. 238; *FEC v. Nat'l Conserv. Pol. Action Comm.*, 470 U.S. 480 (1985); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982). However, in *MCFL*, the Supreme Court carved a narrow exception for non-profit corporations that meet certain criteria. Organizations that meet those three criteria must be exempted from independent expenditure regulation because they pose no danger of corruption of the political process and thus the government lacks the compelling interest necessary to justify regulation. *MCFL*, 479 U.S. at 263-65. The Court specifically found that the defendant non-profit corporation (MCFL) had three attributes that were *essential* to the Court's holding that the government could not regulate the defendant's political expenditures:

> *First*, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . *Third*, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This

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[13] Minn. Stat. § 211B.15 subd. 4 makes clear that corporations may make contributions to promote or defeat a ballot question or to comment on issues of public concern. Thus, the statute complies with the rule announced in *Bellotti*.

> prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.

Id. at 264. Subdivision 15 codifies the requirements for non-profit corporations set forth in *MCFL*, providing that the prohibitions set forth in Chapter 211B do not apply to nonprofit corporations that (1) cannot engage in business activities; (2) have no shareholders; and (3) were not established by a business corporation or labor union and have a policy against accepting contributions from those entities. *See* Minn. Stat. § 211B.15 subd. 15.

MCCL does not have shareholders, but it cannot satisfy the remaining two requirements. Because the *MCFL* Court indicated all three requirements were essential to the non-profit exception, failure to meet any single criterion would be independently sufficient to deny MCCL exemption from the regulation. The corporation admits that it engages in business activities, including rental of its membership list and advertisement sales. (*See* Second Schwietz Affid. ¶ 7). It essentially argues for a *de minimis* exception, contending that its business activities are "incidental to [MCCL]'s primary purpose" and generate relatively little income and thus pose little risk of actual or apparent corruption of the political process. However, neither *MCFL* nor Subdivision 15 provides an exception for "incidental" business activities. *See MCFL*, 479 U.S. at 263 (reason that corporation exempted was not that it posed *lesser* threat of corruption, but that it posed no threat at all).

MCCL similarly contends that it satisfies the third *MCFL* requirement because the contributions it receives from business corporations are relatively small and are

insignificant. The portion of MCCL's receipts derived from corporate contributions or whether corporate contributions are "significant," is irrelevant. MCCL admits it accepts corporate contributions and it has neither alleged nor proved through [sic] that it has a policy against accepting such contributions. Absent a clear enforced policy against accepting contributions, the risk exists that a non-profit corporation could accept large contributions from for-profit business corporations and become an instrument for precisely the type of unfair influence on the political process the limits on for-profit independent expenditures properly seek to eradicate. *See e.g., Austin,* 110 S. Ct. at 1398; *MCFL,* 479 U.S. at 262-64. Because MCCL has no policy against accepting contributions from business corporations, it cannot satisfy the third requirement of the *MCFL* exception. *See id.* 469 U.S. at 264; *FEC v. NRA Pol. Victory Fund,* 778 F. Supp. 62, 64 (D.D.C. 1991), *rev'd on other ground,* 6 F.3d 821 (D.C. Cir. 1993).

Finally, MCCL asserts that Minn. Stat. § 211B.15 subd. 2 violates its First Amendment rights and those of its members "by completely prohibiting MCCL from encouraging its members to volunteer their services to candidates." This contention misconstrues the terms of the statute. The language of the challenged subsection prohibits corporations from contributing "the free service[s] of its . . . members," Minn. Stat. § 211B.15 subd. 2, to a candidate for office or political organization, but says nothing about encouraging members to participate in the political process. The phrase "contribution of free service of its members" implies some ability of the corporation to compel or control the attendance of or provision of other

services by its members, most plausibly because the corporation pays monetary compensation to those members. There is no evidence that MCCL exercises such control over its members. Further, nothing in the statute limits internal communications between a corporation and its members. MCCL remains free to "encourage" its members to voluntarily participate in political activities, as long as the members are acting on their personal time and not as officers or employees of the corporation when they participate in those activities.

MCCL further contends that Subdivision 2 unconstitutionally restricts the right of individuals to participate in the political process. By its terms, the statute applies only to corporations, not to the conduct of individuals. *See* Minn. Stat. § 211B.15 subd. 2. "[S]ervices provided without compensation by an individual volunteering personal time on behalf of a candidate, ballot question, political committee or political fund" are expressly excluded from the distinct statutes governing individual political contributions. *See* Minn. Stat. §§ 10A.01, subd. 7 & 10A.27, subd. 1. Subdivision 2 does not apply to individuals and does not limit their First Amendment rights.

The corporate contributions statute, Minn. Stat. § 211B.15, is not unconstitutionally vague or overinclusive. For purposes of this First Amendment analysis, any differentiation between candidates for appointed and elected public office is a distinction without a difference. MCCL's failure to satisfy two of the three *MCFL* requirements disqualifies it from the narrow non-profit corporation exemption from government regulation. The statute does not otherwise infringe Plaintiffs' constitutional

rights. The State's regulation of corporate political expenditures embodied in Minn. Stat. § 211B.15 is thus constitutional as applied to MCCL.

CONCLUSION

The challenged independent expenditure provisions of Minn. Stat. § 10A are constitutional and the State may enforce those provisions. The $100 contribution limit set forth in Minn. Stat. § 10A.27 subd. 12 is not narrowly tailored to satisfy the government's compelling interest in avoiding the potential for corruption of the political process and the appearance of such corruption. That provision of the statute violates the First Amendment and therefore the State may not enforce Minn. Stat. § 10A.27 subd. 12. The challenged portions of the State's regulation of corporate political contributions and expenditures, set forth in Minn. Stat. § 211B.15, are constitutional, and the State may enforce that statute.

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. The Plaintiffs' motions for summary judgment are GRANTED only to the extent they seek a declaration that Minn. Stat. §10A.27 subd. 12 is unconstitutional and to enjoin Defendants from enforcing that provision;

2. The Clerk of Court shall enter partial judgment in favor of the Plaintiffs in Civil File Nos. 3-93-857 and 3-93-876, declaring Minn. Stat. §10A.27 subd. 12 unconstitutional and permanently enjoining Defendants from enforcing Minn. Stat. §10A.27 subd. 12;

3. The Plaintiffs' motions for summary judgment are DENIED in all other respects;

4. The Clerk of Court shall enter judgment in favor of the Defendants on all Counts of Plaintiffs' Complaints in Civil File Nos. 3-93-857 and 3-93-876, with the exception of the partial judgment in favor of Plaintiffs ordered in Item 2, *supra;* and

5. These suits are DISMISSED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 27, 1994.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court
Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

SCOTT DAY, Treasurer of IMPACE-MEA; IMPACE-MEA; and STEVE FRAZIER and RICHARD KIMBLER,

Plaintiffs,

v.

VANNE OWENS HAYES, in her capacity as Chair of the Ethical Practices Board,

Defendant.

Civil File No. 3-93-857

ORDER AMENDING JUDGMENT

(Filed June 9, 1994)

This matter is before the Court upon the Defendant's Motion for an Order Amending Judgment. The Court previously directed that judgment be entered in this and a related case, in a Memorandum and Order dated May 27, 1994. After review, the Court finds that the May 27 Memorandum and Order contains a clerical error resulting from an oversight by the Court. *See* Fed. R. Civ. P. 60(a). Pursuant to Rule 60, the Court determines that amendment of its prior order and judgment is appropriate.[1]

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[1] The Plaintiffs concur that this amendment of the Court's order and judgment is appropriate. Because this change does not affect the substance of Plaintiffs' pending appeal to the Court of Appeals for the Eighth Circuit, the Court believes this amendment should not necessitate the filing of a new appeal. *See* Fed. R. Civ. P. 60(a). This is particularly true given the

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. Paragraph 2 of the Memorandum and Order dated May 27, 1994 is amended to read:

> "The Clerk of Court shall enter partial judgment in favor of the Plaintiffs in Civil File No. 3-93-876, declaring Minn. Stat. § 10A.27 Subd. 12 unconstitutional and permanently enjoining Defendants from enforcing Minn. Stat. § 10A.27 subd. 12";

and

2. The Clerk of Court shall amend the judgment entered in *Scott Day, et. al. v. Hayes* (Civ. File No. 3-93-857) by deleting the partial judgment entered in favor of the Plaintiffs in that action.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 9, 1994.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court
Judge

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immediacy of the issues presented by the appeal and the concomitant benefits of expeditious appellate review of this Court's decision in this matter.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

SCOTT DAY, Treasurer of IMPACE-MEA; IMPACE-MEA; and STEVE FRAZIER, a Minnesota taxpayer and contributor to IMPACE-MEA,

Plaintiffs,

v.

VANNE OWENS HAYES, in her capacity as Chair of the Ethical Practices Board,

Defendant.

Civil File
No. 3-93-857

and

MINNESOTA CITIZENS CONCERNED FOR LIFE, INC.; JACQUELINE A. SCHWIETZ, Treasurer of Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates; and EILEEN ANGELL,

Plaintiffs,

v.

VANNE OWENS HAYES, as Chair of the State Ethical Practices Board; and HUBERT HUMPHREY III, as Attorney General of the State of Minnesota,

Defendants.

MEMORANDUM & ORDER

Civil File
No. 3-93-876

(Filed
May 27, 1994)

(Judgment Entd.
May 27, 1994)

This matter is before the Court upon Plaintiffs' motions seeking preliminary injunctions. For the following reasons, the Court denies those motions.

BACKGROUND[1]

Responding to concerns about the financing of political campaigns and the potential for and perception of corruption of the political process through undue influence of large financial contributors, the 1993 Minnesota Legislature significantly amended state laws governing political campaigns and the financing of those campaigns. The new statute, *inter alia*, provides incentives for candidates to accept voluntary spending limits including public subsidies to candidates who accept the limits and meet other eligibility criteria; reduces the amounts of contributions candidates may accept from political committees, political funds, lobbyists and certain individuals; limits the amount of contributions a political committee or fund may accept from a single donor in a year; imposes reporting requirements on persons and entities making "independent expenditures" and provides for public subsidy to some candidates who have such independent expenditures made against them. *See* Minn. Stat. Chapter 10A (Supp. 1993) (scattered provisions).

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[1] At this early stage of the case, very little background discussion is necessary or appropriate. This exposition is intended only to provide a brief description of the parties, the statute and the issues before the Court in the motions for preliminary relief. As necessary, additional facts are set forth in the discussion section.

The Plaintiffs in these two consolidated cases brought suit seeking to invalidate several provisions of the new law on December 20, 1993.[2] The matter is presently before the Court upon Plaintiffs' preliminary injunction motions, which effectively seek to enjoin the Defendants from enforcing two provisions of the new campaign law.[3] Specifically, the Plaintiffs challenge the

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[2] Plaintiffs in Civil File No. 3-93-857 are IMPACE-MEA, the registered political fund of the Minnesota Education Association; Scott Day, the Treasurer of IMPACE-MEA; and Steve Frazier, a Minnesota taxpayer and contributor to IMPACE-MEA. The Defendant in that action is Vanne Owens Hayes, sued in her capacity as Chair of the Minnesota Board of Ethical Practices. Plaintiffs in Civil File No. 4-93-1213 (now renumbered 3-93-876) are Minnesota Citizens Concerned for Life; Minnesota Citizens Concerned for Life Committee for State Pro-Life Candidates (MCCLCSPC), a registered political fund of MCCL; Jacqueline A. Schwietz, the Treasurer of MCCLCSPC; Eileen Angell, a resident of Minnesota and contributor to MCCLCSPC. The Defendants in that action are Vanne Owens Hayes and Hubert H. Humphrey III, sued in his capacity as Attorney General of the State of Minnesota. Because the actions pose related challenges to the new law, the Court consolidated the two actions for joint consideration. Except where otherwise noted, the Court shall refer to all plaintiffs in both actions collectively as "Plaintiffs" and to both defendants as "Defendants."

[3] The Court agreed to hear these motions on an expedited schedule because of the statutes' potential application to a special election to fill a vacancy in the Minnesota Legislature, scheduled to be held January 11, 1993. By prior agreement of the parties, the Court today considers only the parties' motions seeking an injunction against enforcement of Minn. Stat. §§ 10A.20 subd. 6b, 10A.25 subd. 13 and 10A.27 subd. 12 (Supp. 1993). After the parties reached this agreement, Plaintiffs in both cases amended their pleadings to add more plaintiffs. Plaintiffs then sought to amend their arguments for a preliminary injunction based on the interests of the new Plaintiffs. The

constitutionality of provisions of the law which require reporting of independent expenditures and provide for corresponding subsidies to candidates who meet certain conditions. They also challenge a provision limiting individual contributions to political funds and committees to $100 per year. The challenged statutes provide, in pertinent part:

> Subd. 6b. Independent expenditures; notice. (a) Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of $100, other than an expenditure by an association targeted to inform solely its own dues-paying members of the association's position on a candidate, the individual, political committee, or political fund shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy of the affidavit on each candidate in the affected race and on the treasurer of the candidate's principal campaign committee. The affidavit must contain the information with respect to the expenditure that is required to be reported under subdivision 3, paragraph (g); except that

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Court does not consider these new arguments for several reasons. Initially, Plaintiffs raise new legal issues in their reply memorandum, affording the Defendants no opportunity to respond. Further, the Court considers these new arguments – presented to the Court late on the day before the hearing on their motions and on the day of the hearing – to be untimely. Finally, and perhaps most significantly, Plaintiffs' assertion of new arguments at the eleventh hour is inconsistent with the agreement of the parties which facilitated this expedited hearing and unfair to the Defendants.

if an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.

(b) An individual or the treasurer of a political committee or political fund who fails to give notice as required by this subdivision, or who files a false affidavit of notice, is guilty of a gross misdemeanor and is subject to a civil fine of up to four times the amount of the independent expenditure stated in the notice or of which notice was required, whichever is greater.

Minn. Stat. 10A.20 subd. 6b (Supp. 1993).

Subd. 13. Independent expenditures; limits increased. (a) The expenditure limits in this section are increased by the sum of independent expenditures made in opposition to a candidate plus independent expenditures made on behalf of the candidate's major political party opponents, other than expenditures by an association targeted to inform solely its own dues-paying members of the association's position on a candidate.

(b) Within 48 hours after receipt of an expenditure report or notice required by section 10A.20, subdivision 3, 6, or 6b, the board shall notify each candidate in the race of the increase in the expenditure limit for the candidates against whom the independent expenditures have been made.

(c) Within three days after providing this notice, the board shall pay each candidate against whom the independent expenditures have been made, if the candidate is eligible to receive a public subsidy and has raised twice

> the minimum match required, an additional public subsidy equal to one-half the independent expenditures. The amount needed to pay the additional public subsidy under this subdivision is appropriated from the general fund to the board.

Minn. Stat. § 10A.25 subd. 13 (Supp. 1993).

> Subd. 10b. Independent expenditure. "Independent expenditure" means an expenditure expressly advocating the election or defeat of a clearly identified candidate, which expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate. An expenditure by a political party or political party unit, as defined in section 10A.275, subdivision 3, in a race where the political party has a candidate on the ballot is not an independent expenditure.

Minn. Stat. § 10A.01 Subd. 10b (Supp. 1993).

Plaintiffs MCCLCSPC et. al. also challenge the constitutionality of the $100 contribution limit, contending it violates their rights to free political speech and association guaranteed by the First Amendment. That statute provides:

> Subd. 12. Contributions to other political committees or funds. The treasurer of a political committee or political fund, other than a candidate's principal campaign committee or a political party unit as defined in section 10A.275,

> shall not permit the political committee or political fund to accept aggregate contributions from an individual, political committee, or political fund in an amount more than $100 a year.

Minn. Stat. § 10A.27 subd. 12.

DISCUSSION

The Eighth Circuit has established the following analysis to be used in considering a preliminary injunction motion:

> [W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Sys., Inc. v. C. L. Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981); *accord Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085, 1090 (D. Minn. 1981), *aff'd*, 684 F.2d 565 (8th Cir. 1982). The burden of proving entitlement to a preliminary injunction is on the movant. *General Mills, Inc. v. Kellogg*, 824 F.2d 622, 624-25 (8th Cir. 1987). In determining whether a preliminary injunction should issue, a court should balance the equities by considering all the factors in a flexible inquiry in which no single factor should be determinative. *Dataphase* 640 F.2d at 113; *General Mills*, 824 F.2d at 624-25. However, the threshold inquiry is whether movant has shown a threat of irreparable injury; failure to show a threat of irreparable harm is a sufficient ground to deny a motion for preliminary injunction. *Gelco*

v. Conniston Partners, 811 F.2d 414, 418 (8th Cir. 1987); *Dataphase,* 640 F.2d at 114 n.9.

I. Threat of Irreparable Harm

A. Independent Expenditures Provisions

Plaintiffs claim that compliance with the "independent expenditures" provisions of the statute would harm them irreparably by limiting their exercise of speech rights guaranteed by the First Amendment. They argue that the subsidy scheme embodied in the statute forces them to choose between refraining from protected political speech and engaging in such speech with the knowledge that an indirect effect of their speech will be to subsidize the speech of their political opponent. They conclude that, by forcing them to make that choice, the state impermissibly restricts the exercise of their First Amendment right to free speech.

The loss of First Amendment freedoms, even for a brief period, constitutes irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373 (1976). However, Plaintiffs cannot show irreparable injury merely by invoking their rights under the First Amendment. *See Rushia v. Town of Ashburnham, Mass.* 701 F.2d 7, 10 (1st Cir. 1983) (citing *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931-32 (1975)). They must show that the statute has a real, unconstitutional chilling effect on free expression. *See Hohe v. Casey,* 868 F.2d 69, 73 (3d Cir. 1989), *cert. denied,* 493 U.S. 848 (1989), and cases cited therein. Incidental inhibition of First Amendment Rights is insufficient to establish irreparable injury. Rather, such harm results from purposeful government suppression of speech. *Id.* Plaintiffs do not make a showing of such

direct, purposeful suppression of their speech. Thus they fail to establish that they will suffer irreparable harm if denied the preliminary relief they seek with respect to the independent expenditures law.

Initially, Plaintiffs have not alleged facts to suggest that any candidate they oppose will likely be eligible for public subsidy in the upcoming election cycle. The mere making and reporting of an independent expenditure by a person or group opposed to a candidate is not sufficient to qualify that candidate for a public subsidy. In order to qualify for a public subsidy based on an independent expenditure made against her, a candidate must have previously accepted voluntary spending limits, must meet public subsidy eligibility requirements and must have raised twice the minimum match otherwise required. *See* Minn. Stat. § 10A.25 subd. 13.[4] The Plaintiffs allege no facts to attempt to show that any candidate whom they oppose has met these requirements or is likely to meet these requirements. Absent such allegations, even Plaintiffs' argument that their independent expenditures will result in public subsidies for their opponents is unsupported speculation.

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[4] Similarly, the increased expenditure ceiling provided by Minn. Stat. § 10A.25 subd. 13(a) applies only to those candidates who have voluntarily accepted the expenditure limits in the first instance *and* whose major party opponent also agrees to be bound by the voluntary limits. *See* Minn. Stat. § 10A.25 subd. 10 (Supp. 1993). Plaintiffs have not alleged facts to suggest that candidates they support and candidates they oppose in the same race will likely agree to be subject to the voluntary spending limits.

Assuming *arguendo* that candidates against whom Plaintiffs make independent expenditures will be eligible for an increased expenditure ceiling or increased public subsidy or both, Plaintiffs still have not demonstrated that any increased funding provided to an opposing candidate would constitute an unconstitutional infringement of their rights guaranteed by the First Amendment. The independent expenditures law imposes no limit on the amount a person or entity may spend and does not otherwise constrain Plaintiffs' exercise of protected speech rights. It merely provides that, under some conditions, the opposing candidate may be entitled to spend additional amounts on his own campaign message and that he may be entitled to an additional public subsidy. Assuming the subsidy is content-neutral, a government's decision to subsidize only certain speech does not abridge the First Amendment rights of those who do not receive the subsidy. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546 (1983); *see Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

Plaintiffs' contention that the independent expenditure law infringes their First Amendment rights and therefore may cause them irreparable injury is intertwined with the underlying merits of the claim, discussed in greater detail *infra* at II.A. Based on that discussion and the foregoing analysis, the Court concludes that the mere possibility that another person's political speech may be advanced or subsidized as an indirect result of the Plaintiffs unfettered exercise of their First Amendment rights does not constitute a threat of irreparable harm.

Plaintiffs also contend that failure to enjoin enforcement of the independent expenditures law poses a threat of irreparable harm because they are unable to determine what the statute requires of them and failure to comply with the law is punishable by criminal penalty. The Court addresses the merits of this "void-for-vagueness" claim *infra* at II.A.2. and preliminarily finds the statute is likely not unconstitutionally vague. Reasonable people can determine what is required of them by the independent expenditures statute and they are not unfairly exposed to threat of criminal sanction without prior warning of what they must do to comply with the law. Therefore, the criminal sanctions provision of the independent expenditures law does not pose a threat of irreparable harm to the Plaintiffs.

B. $100 Contribution Limit

Plaintiff MCCLCSPC argues that the $100 contribution limit poses a threat of irreparable harm because the limit will prevent Plaintiff from raising sufficient funds to fully advance its political ideals. This argument is unpersuasive. Unlike the plaintiffs in *Elrod*, MCCLCSPC cannot argue that it would be completely silenced by the contribution limit. In the most recent election cycle, three-fourths of the Plaintiffs' total receipts came from contributions of less than $100. Plaintiffs have presented no facts or evidence to suggest that they would be unable to collect an amount equal to the remaining one-fourth (26%) through greater numbers of contributions under $100. In any event, "the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages" which may be afforded by freedom of

speech. *Regan v. Taxation with Representation*, 461 U.S. at 550 (1983).

Nearly two decades ago, the Supreme Court established that the First Amendment permits government limits on political contributions. *See Buckley v. Valeo*, 424 U.S. 1 (1976). In partial support of its finding that contribution limits do not offend the First Amendment, the Court stated:

> The overall effect of the . . . contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression . . .

Id. at 21-22. In a recent case challenging the same statute, this Court held that a political committee which raised 29% of its funds from contributions exceeding $100 failed to demonstrate that the $100 contribution limit posed a threat of irreparable harm. *See* Memorandum Opinion and Order, *Minnesotans for Term Limits et. al. v. Hayes*, Civ. Nos. 4-93-766 & 4-93-805 (D. Minn. Nov. 24, 1993) (Murphy, J.). Similarly, Plaintiffs in the case at bar have failed to demonstrate that the mere possibility that they may be unable to raise the level of funds they desire in the coming election cycle constitutes a threat of irreparable harm.

II. Probability of Success on the Merits[5]

A. Independent Expenditures Provisions

1. Restriction or Burden on Free Speech

The Plaintiffs contend that the independent expenditures statute is unconstitutional because it burdens their exercise of free speech rights. In support of this contention, Plaintiffs argue that, through the statute's subsidy and increased expenditure provisions, the Government forces Plaintiffs to subsidize the speech of a candidate they oppose as the price of independent expenditures in favor of a candidate they support. *See* Minn. Stat. § 10A.25 subd. 13 (Supp. 1993). Stated differently, Plaintiffs believe they are faced with a choice "between not speaking or subsidizing the campaign coffers of the candidate being opposed" and argue that difficult choice impermissibly burdens their exercise of free speech rights.[6]

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[5] Plaintiff Steve Frazier challenges Minn. Stat. § 10A.25 subd. 13, alleging that it infringes his First Amendment rights by effectively compelling him to contribute his tax dollars to a candidate he opposes. Because it is unlikely that Frazier could satisfy the strict and narrow requirements for taxpayer standing, *see ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989); *Frothingham v. Mellon*, 262 U.S. 447 (1923), and thus his likelihood of success on the merits is extremely low, the Court will not discuss his challenge further in ruling on these preliminary injunction motions.

[6] Initially, as discussed *supra* at I.A, Plaintiffs have failed to allege any facts which tend to show that any candidate they oppose will be *eligible* to receive an independent expenditure subsidy or that a candidate(s) they oppose will accept the voluntary spending limits in the first place. The Court will assume,

Plaintiffs' argument that if they decide to make independent expenditures they will be forced to subsidize the speech of their opponents misperceives the nature of the subsidy provided by the statute. Unlike the governmental regulations struck down in *Miami Herald* and *Pacific Gas & Electric*, which forced private entities to fund the speech of their opponents directly through expenditure of their own private funds, the present statute provides for a *public* subsidy to opponents of candidates supported by the Plaintiffs. *See Pacific Gas & Electric v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The Supreme Court made it clear in *Pacific Gas* that content-neutral, public subsidies of political speech are permissible. *Pacific Gas*, 475 U.S. at 14-15. The flaw in the government regulation of speech in *Pacific Gas* was that it

> identifie[d] a favored speaker based on the identity of the interests that [the speaker] may represent . . . and force[d] the speaker's opponent – not the taxpaying public – to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of the disfavored speaker.

Id. at 15 (citations omitted). The present statute is content neutral. Any subsidy or increase in expenditure limits is

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for purposes of this discussion at the preliminary injunction stage, that Plaintiffs may eventually be able to show that some candidates they oppose will be eligible for additional public subsidies or subject to the expenditure ceilings. This allows Plaintiffs to clear the threshold requirement that the expenditure ceilings and public subsidy provisions are implicated.

triggered solely by the event of an independent expenditure, regardless of the interest of the speaker or the content of the speaker's message. Further, the entity making the independent expenditure is not forced to expend its own resources to facilitate the expression of an opposing viewpoint.

Contrary to the arguments of the Plaintiffs, the law imposes no restrictions on their ability to make independent expenditures. Plaintiffs are free to make as many independent expenditures as they desire without restraint, censure or penalty by the Government. The independent expenditures law imposes no significant restriction on the Plaintiffs' speech.[7] Instead, the law merely provides that, in certain limited circumstances, independent expenditures may trigger an opportunity for an opponent to respond using public funds, additional private funds or both.

Plaintiffs' contention that the public subsidy provision unfairly advantages the opposing candidate or constitutes an improper use of public funds is equally unavailing. The government has no obligation to subsidize all speech equally. *See Regan v. Taxation with Representation of Washington*, 461 U.S. at 546-47. In the present case, in furtherance of what it believes is the public interest, the Government has simply chosen to subsidize the speech of candidates against whom independent

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[7] Plaintiffs do not argue that the independent expenditure reporting requirements would impose a heavy or costly administrative burden which would chill their exercise of their First Amendment rights. *Cf. Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1396-97 (1990).

expenditures are made while refusing to subsidize the speech of persons and entities which make independent expenditures. Because the subsidies are content-neutral and not "aimed at the suppression of dangerous ideas," they do not run afoul of the guarantees of the First Amendment. *Id.* at 550.

The independent reporting and subsidy provisions of the statute may make the Plaintiffs' strategic decisions regarding independent expenditures and weighing their possible consequences more difficult. However, the First Amendment does not guarantee the Plaintiffs freedom from difficult choices. A government regulation which forces a civic organization to make a difficult choice with respect to the exercise of constitutional rights does not, without more, violate the organization's First Amendment rights. *See Brookins v. O'Bannon*, 699 F.2d 648 (3d Cir. 1983). Here, though the independent expenditures statute may, in some circumstances, create a dilemma for the Plaintiffs, they have not demonstrated a likelihood that such a dilemma would impermissibly restrict their First Amendment rights.

Because the independent expenditure provisions facilitate more speech in some circumstances, they may actually advance core values underlying the First Amendment. A primary purpose of the First Amendment is "to secure the widest possible dissemination of information from diverse and antagonistic sources." *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *see Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969). To the extent that the statute provides for increased debate about issues of public concern raised by an independent expenditure, it actually promotes the free

and open debate the First Amendment seeks to foster and protect. The Court concludes that the Plaintiffs have demonstrated little likelihood of success on their claim that the independent expenditures provisions of the statute constitute an unconstitutional burden on free speech.

2. Vagueness and Overbreadth Challenges

Plaintiffs also contend that the independent expenditures notice provisions should be declared void for vagueness. Due process requires that a law whose violation is punishable by criminal penalty must state clearly what conduct it requires or prohibits. *Kolender v. Lawson,* 461 U.S. 352 (1983). A penal statute which fails to define the criminal offense clearly in terms understandable by ordinary people, is "void-for-vagueness" because it violates constitutional due process requirements. *Id.* at 357. The vagueness doctrine and underlying due process concerns are implicated here because the independent expenditures notice statute provides that failure to comply with the requirements of the statute is punishable as a gross misdemeanor. *See* Minn. Stat. § 10A.20 subd. 6b(b).

The independent expenditures notice provision essentially provides the mechanism through which the Ethical Practices Board (Board) would determine when a candidate – who meets all the other necessary preconditions – is eligible for additional public or private funding on the basis of an independent expenditure made on behalf of his or her opponent. For purposes of the vagueness dispute, the notice obligation is set forth in the following section:

> Subd. 6b. Independent expenditures; notice. (a) Within 24 hours after an individual, political committee, or political fund makes or becomes obligated by oral or written agreement to make an independent expenditure in excess of $100, other than an expenditure by an association targeted to inform solely its own dues-paying members of the association's position on a candidate, the individual, political committee, or political fund shall file with the board an affidavit notifying the board of the intent to make the independent expenditure and serve a copy of the affidavit on each candidate in the affected race and on the treasurer of the candidate's principal campaign committee. The affidavit must contain the information with respect to the expenditure that is required to be reported under subdivision 3, paragraph (g); except that if an expenditure is reported before it is made, the notice must include a reasonable estimate of the anticipated amount. Each new expenditure requires a new notice.
>
> (b) An individual or the treasurer of a political committee or political fund who fails to give notice as required by this subdivision, or who files a false affidavit of notice, is guilty of a gross misdemeanor and is subject to a civil fine of up to four times the amount of the independent expenditure stated in the notice or of which notice was required, whichever is greater.

Minn. Stat. § 10A.20 subd. 6(b) (Supp. 1993) (emphasis added).

Plaintiffs assert that the phrase "becomes obligated by written or oral agreement to make an independent expenditure" is so indefinite that they are unable to

determine their reporting obligations under the statute. They argue that the nature of independent political expenditures and the imprecision of the term "obligated" make it impossible to determine when they are required to report the independent expenditures to the Board. Thus, they conclude, they are subject to risk of penal sanction without adequate notice of what is necessary to conform their conduct to the requirements of the statute.

The Plaintiffs' vagueness challenge to the independent expenditures reporting procedure appears, at this early stage, to present a somewhat closer question than their challenges to the more substantive provisions of the law. The language of the independent expenditure reporting requirements might have been written more clearly or with greater precision. However, whether this Court or the Plaintiffs might have written the statute differently is not the standard which guides the Court's review. The proper inquiry is whether the language of statute as enacted is sufficiently definite to allow ordinary citizens to understand what is required of them and to discourage arbitrary and discriminatory enforcement. *See Kolender,* 461 U.S. at 357. After preliminary review, the Court concludes that, under the due process analysis articulated in *Kolender* and its antecedents, Plaintiffs do not have a substantial probability of success on the merits of the vagueness challenge.

The existence of a legal obligation is readily determined by common experience and the application of well-established principles of contract law and related

equitable principles.[8] Whether an obligation exists between a person or entity making an independent expenditure and the provider of a good or service in exchange for the expenditure does not require speculation or more sophistication or experience than that of an ordinary consumer – either a person is legally obligated to make an expenditure or she is not.[9]

Political funds and committees like MCCLCSPC and IMPACE-MEA have a higher degree of sophistication and

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[8] It reasonable to assume the statute refers to a legal obligation, because the State is without authority to determine the existence of a moral obligation or to attempt to enforce any variety of obligation not grounded in statutory or common law. The Court also notes that none of the Plaintiffs suggests that the alternative event triggering a reporting obligation, the actual *making* of an independent expenditure, should be held void for vagueness.

[9] The individual Plaintiffs do not allege their right to make independent expenditures directly in their capacity as individuals is infringed by the reporting requirement or that the reporting requirement as applied to individuals should be held void for vagueness. It is not clear that the individual Plaintiffs have alleged sufficient facts to confer standing to make such a challenge. However, even if such a challenge were appropriately presented in this action, the Court doubts the individual Plaintiffs could prevail. In the course of day-to-day life, people enter various transactions and oral and written agreements creating binding obligations. The conduct of commerce depends on ordinary consumers and merchants understanding the nature of obligations – including obligations to make expenditures – and how and when those obligations arise. Although possibly somewhat less sophisticated than a political fund or organization, a person of ordinary experience understands when she is legally "obligated." Therefore, the language of the statute is likely not impermissibly vague on its face, even with respect to its application to individuals.

experience in matters of political expenditures and obligations than the ordinary person. In light of that experience, their contention that they would be unable to determine whether or when they become obligated to make an expenditure lacks credibility. Certainly the public media and vendors of other goods and services related to political communications would be unwilling to provide such services if they believed that purchasers of those goods and services would seriously contend they were unable to determine if they had incurred an obligation to pay for those services. The creation of a binding obligation provides a clear line of demarcation between negotiations and discussions regarding independent expenditures, which entities have no duty to report and the conclusive decision to make an independent expenditure, which they must report. If, for example, a political committee contemplates an independent expenditure and discusses the *possibility* of making such an expenditure with a vendor, but enters no binding agreement, the committee is not *obligated* to make such an expenditure and, under the terms of the statute, the reporting requirement is not triggered.

Several of the Plaintiffs' vagueness agruments fail to distinguish between the *timing* of the creation of an obligation and the objective existence of an obligation. The Court understands that the nature of political campaigns in general and particularly independent expenditures makes the timing of decisions regarding the creation of obligations to make such expenditures unpredictable and uncertain. In some cases, the creation of the obligation to make an expenditure and the actual expenditure may occur nearly simultaneously. Further, for a variety of

reasons, a person or entity may plan to make an independent expenditure and later decide not to make the expenditure. However, the timing of the ultimate decision regarding an independent expenditure does not determine whether an entity is obligated to make such an expenditure. Similarly, if an entity enters a binding obligation to make an independent expenditure and later for its own reasons decides not to publish (in the broad sense) the good or service procured by the expenditure, the obligation still exists.

The existence of an obligation is not vague or indeterminate. People of ordinary experience and intelligence understand when they have entered an obligation; a law imposing reporting requirements on those who enter independent expenditure obligations does not require them to guess at its meaning or expose them to the risk of penalty without fair warning. *See Id.; Rowan v. United States Post Office Dept.*, 397 U.S 728, 740 (1970). Accordingly, Plaintiffs are not likely to succeed in their vagueness challenge to the independent expenditure reporting requirements of the statute.[10]

In a related objection, Plaintiffs contend that the reporting obligation may require them to report *obligations* to make expenditures which are not ultimately

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[10] Defendants also contend that the Board's authority to issue advisory opinions on the requirements of the law effectively eliminates any vagueness concern. *See* Minn. Stat. § 10A.02 subd. 12 (1992). The Court is unaware of any authority holding that otherwise unconstitutionally vague statutory language may be cured by the existence of an administrative or adjudicative panel empowered to interpret the law and issue advisory opinions regarding its interpretation.

translated into published political speech in favor of a candidate. The Court interprets this complaint to state a modified "overbreadth" argument, which also incorporates other objections previously discussed. The Plaintiffs essentially argue that due to their failure to translate obligations to speech, their political opponents may be aided by an additional government subsidy when the candidate they support has received no benefit from the expenditure or obligation. This, they apparently conclude, constitutes an overbroad regulation of their political speech because is subsidizes their opponent and effectively penalizes them for speech they did not make. The Supreme Court has emphasized the limited application of the overbreadth doctrine, stating "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep" *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The Plaintiffs' hybrid argument fails for a least two reasons. Initially, the court previously concluded that the independent expenditures provisions do not burden the Plaintiffs' exercise of rights guaranteed by the First Amendment. The reporting requirement does not restrict Plaintiffs' freedom to make independent expenditures – they remain free to make or not make whatever expenditures they wish. Plaintiffs offer no argument to suggest that the law would burden the exercise of First Amendment rights of others not before the Court. Because neither the Plaintiffs nor any other citizen's First Amendment rights are burdened by the reporting requirement, overbreadth analysis is not appropriate.

Second, as previously discussed, the Government has no obligation to subsidize various types of expression equally, as long as the subsidy scheme is content-neutral. *See Regan v. Taxation with Representation,* 461 U.S. 540 (1988); *Pacific Gas & Electric v. Public Utilities Comm'n of California,* 475 U.S. 1, 15-16 (1986). The fact that the triggering event for government subsidy of a candidate's campaign expression may or may not correlate with an actual expenditure in support of that candidate's opponent is not relevant to the principles expressed in *Regan* and its progeny. Plaintiffs have little likelihood of success on their claim that the independent expenditures provisions of the statute are overbroad.

B. $100 Contribution Limit

Plaintiffs also contend that the $100 contribution limit unconstitutionally infringes their right of free association guaranteed by the First Amendment. The Court agrees that the contribution limit imposes at least some restriction on freedom of association. However, under the analysis set forth in *Buckley,* even a significant government interference with rights of political association may be sustained if it is justified by an important government interest and if it employs means narrowly drawn to avoid needless infringement of associational freedoms. *Buckley v. Valeo,* 424 U.S. at 25-26 (1976). The Supreme Court extended the rule announced in *Buckley* to multicandidate political committees like Plaintiff MCCLCSPC in *California Med. Ass'n v. Federal Elec. Comm'n,* 453 U.S. 182 (1981). The government regulations approved in *Buckley* and *California Med. Ass'n* were political contribution ceilings very

similar in design and intent to the limit imposed by Minn. Stat. § 10A.27 subd. 12.

As in *Buckley*, a primary concern of the Minnesota Legislature in enacting this statute was prevention of the appearance and reality of corruption of the political process through the exercise of undue and improper influence by persons and entities making large financial contributions. The legislative history suggests that the Legislature also intended the contribution limit to restore and maintain citizens' confidence in their government and elected officials. "Preserving the integrity of the electoral process [and] preventing corruption . . . are interests of the highest importance. Preservation of the individual citizen's confidence in government is equally important." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (citations omitted). The State will likely be able to show that the contribution limit is supported by compelling government interests.

Plaintiffs argue that the contribution limit is not narrowly tailored to avoid unnecessary infringement of associational freedoms. They contend that the $100 limit is so low that it unnecessarily limits the rights of citizens to engage in legitimate expressive political activity and abridges their rights of association. The Supreme Court addressed a similar objection in *Buckley* and held that, as long as a reviewing court is satisfied that some limit on contributions is necessary, it need not attempt to determine the precise amount which will effectuate the government's important interest. *Buckley*, 424 U.S. at 30. In this context, such differences in degree of regulation are significant only if they amount to differences in kind. *Id.* Plaintiffs have failed to proffer any argument which

would suggest that the $100 contribution limit is so low as to constitute a difference in kind.

This Court recently upheld the same contribution limit against a similar preliminary challenge by a multicandidate political committee. *See* Memorandum Opinion and Order, *Minnesotans for Term Limits et. al. v. Hayes,* Civ. Nos. 4-93-766 & 4-93-805 (D. Minn. Nov. 24, 1993) (J. Murphy). In that case, Judge Murphy applied the teaching of *Buckley* and its progeny and found that, as applied to a political committee which supported a number of candidates (plaintiff Republican Victory Club), the $100 limit likely complies with the requirements of the First Amendment. *Id.* Finding neither a threat of irreparable harm nor sufficient likelihood of success on the merits, the Court denied the multicandidate political committee's motion for preliminary injunction.[11] Judge Murphy's

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[11] In the same consolidated case, Judge Murphy enjoined enforcement of the $100 contribution limit with respect to plaintiff Minnesotans for Term Limits (MTL). However unlike the Plaintiffs in the present case, MTL does not make expenditures or contributions in support of any candidate or otherwise advocate the election or defeat of any candidate. It exists solely to advocate the imposition of limits on the term in office of all elected officials. With respect to such an entity, it is far less certain that the government has a sufficiently important interest to justify the restriction of associational freedom imposed by a contribution ceiling. *See Buckley,* 424 U.S. 1 (1976); *Minnesotans for Term Limits et. al. v. Hayes,* Civ. Nos. 4-93-766 & 4-93-805 (D. Minn. Nov. 24, 1993). The Plaintiffs in the instant case admittedly advocate the election or defeat of numerous candidates, partly through the expenditure of funds. Therefore, while Plaintiffs' claim is closely analogous to that of the multicandidate political committee Republican Victory Club, it is plainly distinguished from that of the MTL in *Minnesotans for Term Limits v. Hayes.*

well-reasoned analysis in that case applies with equal force to the Plaintiffs' challenge to the same contribution ceiling in the instant case.

The $100 contribution limit imposed by statute in Minnesota appears constitutional. This conclusion is buttressed by a recent opinion issued by this Court involving the same statute and nearly identical issues. Therefore, the Court concludes that Plaintiffs' likelihood of success on the merits of their constitutional challenge to the contribution ceiling is fairly low. Similarly, as discussed above, the Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their challenge to the independent expenditures provisions of the Minnesota campaign finance statute.

III. Public Interest and Balance of the Harms

The remaining two factors do not strongly favor either side. The public interest is strongly implicated by this suit. The First Amendment rights asserted by Plaintiffs are among the most important rights guaranteed by the United States Constitution and the exercise of those rights is critical to an informed electorate and a healthy democracy. The public also has strong interests in eliminating the appearance of and potential for corruption in the democratic process, encouraging citizens' confidence in their government and in implementing laws enacted by the Legislature.

Plaintiffs will suffer injury to their First Amendment interests if the state is allowed to enforce a statute which is later found to impermissibly infringe their First Amendment rights. However, if the Court enjoins

enforcement of the campaign law, the Government will suffer injury to its sovereign interests, to its interest in implementing laws enacted by the Legislature, and to the interests of combatting [sic] both corruption of the political process and erosion of public confidence in the government. The positions of both sides implicate significant public interests and the balance of the harms favors neither party.

CONCLUSION

The Plaintiffs have failed to demonstrate they face a threat of irreparable harm if the Court does not issue an injunction. The Plaintiffs also have not demonstrated a substantial likelihood of success on the merits of their challenges to the Minnesota campaign finance statute. The balance of the harms and the public interest favor neither side. Consideration of the four factors together compels the conclusion that Plaintiffs have failed to demonstrate that preliminary injunctive relief is appropriate. Accordingly, Plaintiffs' motions for preliminary injunctions will be denied.

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. The motion of the Plaintiffs in Civil File No. 3-93-857 (Clerk Doc. No. 2) seeking to enjoin enforcement of Minn. Stat. §§ 10A.20 subd. 6b & 10A.25 subd. 13 (Supp. 1993) is DENIED; and

2. The motion of the Plaintiffs in Civil File No. 3-93-876 (Clerk Doc. No. 2) seeking to enjoin enforcement

of Minn. Stat. §§ 10A.20 subd. 6b, 10A.25 subd. 13 & 10A.27 subd. 12 (Supp. 1993) is DENIED.

Dated: January 5, 1993.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District
Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Scott Day, Treasurer of IMPACE-MEA, a Political Fund, et al.,

Plaintiffs,

vs.

Vanne Owens Hayes, in her capacity as Chair of the Ethical practices Board, or her successor,

Defendant.

Court File No. 3-93-857

Minnesota Citizens Concerned for Life, et al.,

Plaintiffs,

vs.

Vanne Owens Hayes, in her capacity as Chair of the Ethical Practices Board, et al.,

Defendants.

Court File No. 4-93-1213

AFFIDAVIT OF NANCY L. HELMICH

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

NANCY L. HELMICH, being first duly sworn upon oath, deposes and says as follows:

1. I am a legal assistant in the Minnesota Attorney General's Office.

2. At the request of Jocelyn F. Olson, Assistant Attorney General, I reviewed the portions of the legislative history of H.F. 163, S.F. 152 and H.F. 201, which were considered by the Legislature during the 1993 session.

3. I obtained official minutes of committee meetings and listened to tape recordings of committee meetings. I taped portions of the committee hearings relevant to H.F. 163 and S.F. 152 and asked secretaries in our office to transcribe the tapes. I then reviewed the transcripts as I listened to the tapes.

4. Attached to this affidavit are transcripts of the following:

Exhibit A: Excerpt from Senate Ethics and Campaign Reform Committee Meeting of Tuesday, February 2, 1993.

Exhibit B: Excerpt from the tape of the General Legislation, Veterans Affairs and Elections Committee of the House from February 15, 1993.

These transcripts are true and correct to the best of my knowledge.

/s/ Nancy L. Helmich
NANCY L. HELMICH

Subscribed and sworn to before me
this 28th day of December, 1993.

/s/ Deborah D. Jones
Notary Public

[SEAL]

Exhibit A

A PORTION OF THE SENATE ETHICS AND CAMPAIGN REFORM COMMITTEE MEETING FROM TUESDAY, FEBRUARY 2, 1993

Senator William Luther ("**Sen. L**") is introducing Senate File No. 152. Also speaking will be Joan Higinbotham ("**J.H.**"), Executive Director, Common Cause-Minnesota.

Sen. L: . . . Members, its a privilege for me to come before you to present Senate File No. 152, which is otherwise known as the Common Cause Proposal. But just to give you a little background, Common Cause brought together a task force dealing with these ahh, the issue of campaign finance reform. Early last summer and ahh, in the entire interim, one break that we got from our campaigns this year was those monthly meetings or whatever it was that we participated in on this task force. It was a bipartisan task force and it consisted of members of the Democratic Party, members of the Republican

Party, members of Common Cause, League of Women Voters, representation from the Ethical Practices Board, and just ahh, I think everyone who participated agreed that it was one of those task forces where it seemed like every point of view was represented. And I'm pleased to say that the product before you is a result of a consensus that was developed among those members of the task force. To my recollection, never once was a vote, a specific vote taken. It was the recommendations; the recommendations consisted of a consensus that was reached among the members as to the ways in which we could improve the political process in the State of Minnesota. And the goals didn't seem to be goals that we disagreed on. It was just a general feeling that we wanted, ahh, the goals, quite frankly were very similar to the ones that you advanced, Mr. Chairman, at our earlier meeting. You know, races where there'd be more of an opportunity for challengers to take on incumbents; whether it be less of what we'd term "special interest" money, where there'd be more reliance on small amounts of money from large numbers of people. And, ahh, I think with those goals in mind, we're pleased to say that we came up with a number of, I think, just excellent recommendations and they're contained in this bill.

Before going through the bill, and I'll do that, I'll proceed through the bill, I'd like to call on Joan Higinbotham from common Cause to make some preliminary remarks.

Chair: Thank you. Welcome to the Committee, Ms. Higinbotham.

J.H.: Thank you, Mr. Chair. Members of the Committee. I'm happy to come here today to talk about the campaign finance proposal that was put together by the task force from Common Cause. Senator Luther will take us through the bill section by section. I would just like to provide a little background and some context for the work that went into the proposal.

The genesis for this legislation is one of the factors that I think make it a strong and valid approach to reforming a system of financing political campaigns. As Senator Luther said, the task force was convened by Common Cause in May of 1992. One of the primary criteria was that everybody had to have a different point of view, it seemed. And the people who were involved shared one thing. They had all been involved in campaign finances in some way; some had been candidates, campaign managers, members of watch-dog groups, members of the legislature, party officials, and so on. So it was, indeed, a very broad-based group. We had members of the Ethical Practices Board, staff from the Ethical Practices Board, and so on. Many of those people are with us today and they would also be happy to answer questions that, if any should arise during the, during the hearing.

Joan Higinbotham (continuing):

The group brought a lot of different philosophies and many different perspectives to their tasks. I think, as Senator Luther said, one thing that was interesting was that everybody was very frank and honest and open and not everybody agreed all the time. There was a lot of disagreement. But the one thing that I, who

came into the process in the middle, was very interested in, was the fact that diverse people can come together and can agree on one final proposal which is what we have here. I think that one of the things that's important to remember is that this group of people looked at things from a very pragmatic point. They wanted something that was reasonable; something that could be passed; something that would be workable for both volunteer treasurers and candidates as well. So it is a compromise package, and I think one thing also to remember is that probably nobody enthusiastically supports every bit of it. But in the view of the group, it's going to close some major loopholes that are now present and it will create a level playing field for both challengers and incumbents. And it has a broad base of support from those outside who observe the system and from the candidates within the system.

The task force, first of all, looked at certain goals and underlying values that they had for the kind of campaign finance reform system they wanted to see. And they used these goals and values as a yardstick against which they measured the desirability of the proposals of the reforms that they proposed. And the goals and objectives and values, I think, are important to look at, because it was not only the means that they were looking at, it was the ends that they wanted that were important. They wanted to enhance the public's confidence in the political process and in public officials. They wanted to encourage a broader public participation in the electoral process. They hoped to remove barriers to candidacy by qualified challengers. They wanted to simplify the system. They

wanted to bring about a more open, accountable, responsive political process. They wanted to increase the substantive quality of the elections. They wanted to decrease the influence of money while increasing the influence of merit. The task force worked through the critical issues. Members were always mindful that whenever changes would be made at point in the system, it would result in new problems at other points in the system.

It reminds me somewhat of the old Rubik's cube. After you get all the faces on one side carefully aligned, you'd look around and see that the other side is completely out of alignment. We feel that this proposal has done a long was [sic] to solving the riddle of the Rubik's cube of political reform. For this reason, we'd like to see it go forward intact. We believe that moving and rearranging the various parts may result in a mismatched proposal with some negative and unintended consequences.

Joan Higinbotham (continuing):

This bill makes comprehensive, necessary changes in campaign finance law. It has broad, bipartisan support and I think the members of the task force agree that it will go a long way toward restoring public confidence in the political process and inferring[word?] an equal opportunity for all candidates, both challengers and incumbents.

Chair: Thank you. Are there questions for Ms. Higinbotham?

Chair: If not, thank you very much.

J.H.: Thank you.

[Short side conversation.]

Sen. L: Before I proceed then, I certainly would ask any other member from the task force that would like to make a statement, that certainly, I'd welcome it. I do see a number of members of our task force that are here today, and I really simply can't do enough to commend the effort that they put in. It's just outstanding. Many, many meetings and lots of hard work, and they're all important, busy people, so it was very good hardworking group, and I appreciate it.

Sen. L: With that then, Mr. Chairman, what I'd like to do is just proceed through the bill and I take it the one that everyone has is the one that has eleven. . . .

Chair: Senator Luther, the one that we have in the packets is 93-1133.

Sen. L: Then I'll just proceed through the bill so that members will understand the provisions. I'll try to go quickly, but I'd certainly be glad to answer any questions along the way.

Section one of the bill defines election. . . .

. . . .

Section fourteen. A section that would limit the amount, the size of the contribution to a PAC. This would prevent a few folks, a very small group of folks from getting together and just saying, hey, let's have a PAC and let's give, you know, kind of as a front for us, and let's get it, ahh, give a lot of money to it and have the PAC make contributions. This would limit any contribution to a PAC to $200.00 and again, I think that's a major reform. I'm sure there are PACs today that get contributions well in excess of

$200.00, so this would require again, large numbers of people making small contributions.

Exhibit B

AN EXCERPT FROM THE TAPE OF THE GENERAL LEGISLATION, VETERANS AFFAIRS AND ELECTIONS COMMITTEE OF THE HOUSE FROM FEBRUARY 15, 1993

Joan Higinbotham ("J.H.)" and Tom Berg ("T.B.") from Common Cause are discussing their task force report on campaign reform and the proposed legislation in House File No. 163.

Chair: . . . so at this time then, we'd ask Tom and Joan to come forward, please. Welcome to the committee. I understand taht [sic] you have been working hard and long on this.

J.H. Mr. Chairman and members of your committee. My name is Joan Higinbotham and I'm the Executive Director of Common Cause-Minnesota and I'm happy to have the opportunity to come here today to talk about our campaign finance reform proposal. You'll have an opportunity to go over the specifics of the bill in a while. I'd just like to provide a little background and context for how this came about.

The genesis of this legislation, I think, is really one of the factors that make it a strong and a valid approach to reforming the political campaign finance system. In May of 1992, Common Cause put together a task force of people who were involved in some way with campaign

finance. It was a diverse group of people with members from both political parties, legislators, staff and board members of the Ethical Practices Board, lobbyists, representatives from the citizens' group, the League of Women Voters, and Joint Religious Legislative Coalition and other groups. So it really had representation from people who were running for office and were in the legislature and people who watch-dogged those groups. The group did bring a lot of different perspectives to the process and a lot of different philosophies.

One thing that I thought was interesting, and I came into it when we were half-finished, was the fact that people with very different philosophies could talk frankly and honestly about how they felt about these issues, say what they thought wouldn't work and what would work, and come up with a compromise that everyone agreed with. Because it's a compromise, I don't think anybody loves every bit of it. They're not completely enthusiastic about all the provisions but in the view of ___, it will close some of the major loopholes that we now have and it will create a level playing field for challengers as well as for incumbents, which is one of the things that we were looking at. It also has a broad base of support from all those groups who were involved in the task force. It's a bill that they've all agreed to and that they can all get behind and support.

Joan Higinbotham (continuing):

When the task force was working, they started out by looking at certain goals and values for the system of campaign finance they wanted to see. And they used these as sort of a yardstick

to measure what they did. In other words, they didn't start out by making the changes; they started out by looking at what kind of ends they wanted to have. And they decided what they wanted to see. And the things they were concerned about were first of all, enhancing the public's confidence in the political process and in public officials. They wanted to encourage broader participation in the whole electoral process. They wanted to take away some of the barriers that qualified challengers saw when they thought about whether or not they should run for office. And they wanted to simplify the system of running for office. They wanted to bring about also a more open, a more accountable, and a more responsive process. They wanted to increase the substantive quality of the elections and I think another important thing, they wanted to decrease the influence of money and they wanted to increase the influence of merit in campaigns.

And as they went through the critical issues that were involved, they were always thinking about whenever you make a change at one point in the system, there might be new problems at another point in the system, and I think that that's something they were very concerned about. And the example that I like to think about is that Rubik's cube that we used to use when we were kids and we'd get one side all lined up and we'd look at the other side and it was all out of alignment. And that's something that could happen with the campaign funding process as well. So we think that in this process we've looked at it very carefully from all sides and put together a package that is fair to incumbents and challengers and that has a lot of key

elements that are sort of closely interlocked. If you change one, you may have unintended consequences along the way. That's why we would like to see the bill go forward in tact, because we think that if you rearrange and change, you do get the unintended consequences.

The task force, I think, feels very strongly that this bill does make some comprehensive, some necessary changes in the campaign finance law. It does have sound, strong, bipartisan support and we think that it will go a long way toward restoring public confidence in the political process and also ensuring equal opportunities for everyone who runs for office.

Joan Higinbotham (continuing):

As I said, it was a task force that was broadly based. We were happy to have one of our members, Tom Berg, who was sitting on the other side of the table some years ago, when he was the first, when he was the author of the first comprehensive campaign finance reform bill. And he is going to talk to you a little more about the specifics of what happened in the process, and what we bring before you today.

T.B.: Thank you, Joan. I guess I get, maybe, a chance to correct what we did back in 1974, because as Joan said, I was the chief author of that legislation back in 1974 that provided for the first time, the system of public financing; major emphasis on public disclosure as a way to police what's going on in the election process and we created the Ethical Practices Board. Since then, a lot has happened, obviously. As a result, the task force was put together that Joan Higinbotham mentioned. And the groups that

have been involved in that, at least some of the groups, were the League of Women Voters, Common Cause that Joan represents, the Joint Religious Legislative Coalition and the Citizens League. In addition, Todd Otis was there, DFL state party chair; Representative Pawlenty was involved; I think Representative Lasley stopped by at one of the meetings; Senator Laidig was involved; Senator Luther; just a variety of people from both political parties, worked very hard on this for about six months. Meeting in the morning early, trying to hammer out a realistic bill. I think we have done so.

The purpose of the legislation is really quite simple. It is to make our democracy work better; that's really what it comes down to. And if we do that, I think voter confidence in the system, in the electoral system is going to even go up. I think voter confidence in you as legislators will go up, and in the legislation that you pass will go up. And that is really the purpose that we try to keep in mind as we went forward. I think the election process is similar to the judicial process in the sense that perception is very important; perception of fairness and improperness, and I think we've tried to accomplish that in this legislation.

In 1974 when we passed this, it was right after Watergate, and the voters were very much demanding some change and we provided it. Since that time, in my view, I think unfortunately in some sense, direct participation of politics has gone down. I think the caucus attendance is down; the amount people checking off is down in the check-off system; and direct giving to campaigns I think is down. But I'm a

believer at least that people still care about Minnesota and the country and the electoral process. And in part of that, they have gone to PACs to express how they care. And that, there's good PACs and bad PACs and we tried to avoid that because that depends on your perspective; what's a good one and what's a bad one. But people do care and they give a lot of money through PACs to causes for children, for the environment, for both sides of the abortion question, for business and labor, and so on and so forth. But that's what I think has happened in the last eighteen years or so – there's been a decrease in direct participation and kind of an increase in the more indirect participation through PACs.

Tom Berg (continuing):

I think right now, Mr. Chairman and members of the committee, that you have voters in a mood not dissimilar from what happened after Watergate and that there's very close scrutiny as you probably know better than anybody else, whether it's trips to Duluth or ski trips or how campaigns are funded, the voters are looking at things pretty close and are demanding changes in the status quo. I think that's part of the explanation for Ross Perot getting 24% of the vote here in the State of Minnesota. So I think that all of you need to act this session; I think the Governor needs to sign the bill this session; I think the voters are demanding it. And what we have done here is try to design a bill that fills the bill here and fits this need. We have done this by trying to encourage more citizen direct involvement in the process through a system of matching funds in terms of payment for

campaigns. We have reduced, substantially, the impact of special interest money or PAC money in that the amount of money that a PAC can give to a campaign has been reduced dramatically. In addition, we've put an aggregate limit on as to how much can come into campaigns from PACs, lobbyists, and big givers, to try and get a handle on that and reduce the impact of that.

We have also tried to level the playing field between challengers and incumbents in that a challenger can get to, can spend 10% more than an incumbent. I realize the difficulty of that for all of you – that you're incumbents – but at one point in time we were all challengers and I think and the thinking of the task force was that that is a fair provision. We retained very major support for the concepts that were the hallmark of the legislation that we passed back in '74, i.e., public disclosure and limits. And those things are very important. And we recommend significant funding for the Ethical Practices Board to try to help make all of this work in a good and proper manner. We believe we have done this in a manner consistent with the Constitution and with the realities of a DFL-controlled legislature and a republican governor. We have been in touch with the Governor's office trying to keep them informed and work with them on the legislation, because it isn't going to do anybody any good to get into, in my view, into a partisan fight over this and get something passed and then get it vetoed. I don't think the voters are going to want that to happen. I know there probably will be a few partisan, unless it's changed a lot since when I was over here, there may be a few partisan battles along the way

because we had them when we passed it in '74. But we managed to kind of keep it all going together and get it passed, and I hope that you can do that this session.

I think there are still a number of people in our society and certainly everybody on that task force, who believe that serving as a legislator is very important business; its' tough and hard work, and that campaigns do help educate the electorate, and we want to assist you in trying to pass this legislation. As Joan mentioned, we want to try to hold this bill together. There are some delicate compromises in this. Again, all these people were volunteers, worked over six months, some strong arguments, a few laughs in the process, but we came up with what I think is a pretty good bill. And again, I would suggest from the history that I have learned, that it's important to try to work together and to try to hold the bill together in a package.

Tom Berg (continuing):

Let me just mention a couple of the concepts here and then I know that Representative Sparby will take you through it. We prohibit the "friends of" committees and that they have to be dissolved, is one of the things that's in the bill. I mentioned the increase in spending for challengers. We tried to think through carefully in this bill how it really works in the real world and a number of folks on the task force have been involved in campaigns, both state-wide and legislative races, and so we've tried to come through with a realistic bill. And on that expenditure limit for challengers, for example, it's for a challenger who has not run previously for any

other office whose territory now includes a population that is more than one-third of the population in the territory of the new office, to try to preclude the situation where some very popular local official who has got a great big base in a legislator's district, can go out and have that base and still go on to spend another 10%. That would not be fair to all, to the incumbents. And that, I just cite that as an example of the kind of thing we tried to balance and think through to be fair to the various interests that get involved in this whole area.

We restricted the use of carry-forward contributions. One of the other things that we did here was we allowed there to be a PAC, a PAC can be set up by a corporation – they can't use any corporate money for it obviously – but they can at least have a PAC; we clarified that part of the law. They can advance some money to set up and create a PAC, but then they have to pay it back out of the money they receive from the PAC. In other words, the individuals then contribute to the PAC and that money's got to go off the top to pay for those administrative costs. But it clarifies the fact that there can be PACs there.

Tom Berg (continuing):

The other, oh, there's a variety of things in the legislation, but I think I'll just stop there, and Representative Sparby will cover that, and we're certainly available to answer questions or try to help you now, or anywhere through the process. We have, this task force and the groups involved, are very much committed to getting something passed here, so there will be lobbying assistance available and to do what we think

is appropriate, and hopefully you'll view it as assistance, and not anything otherwise, because we want to get a bill passed and we think we've got a good bill that fits what I think the people of Minnesota want and should have.

Chair: OK, thank you for the presentation.

[END OF TRANSCRIPTION HERE.]